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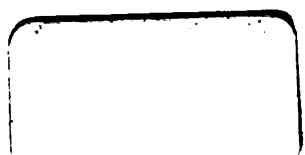
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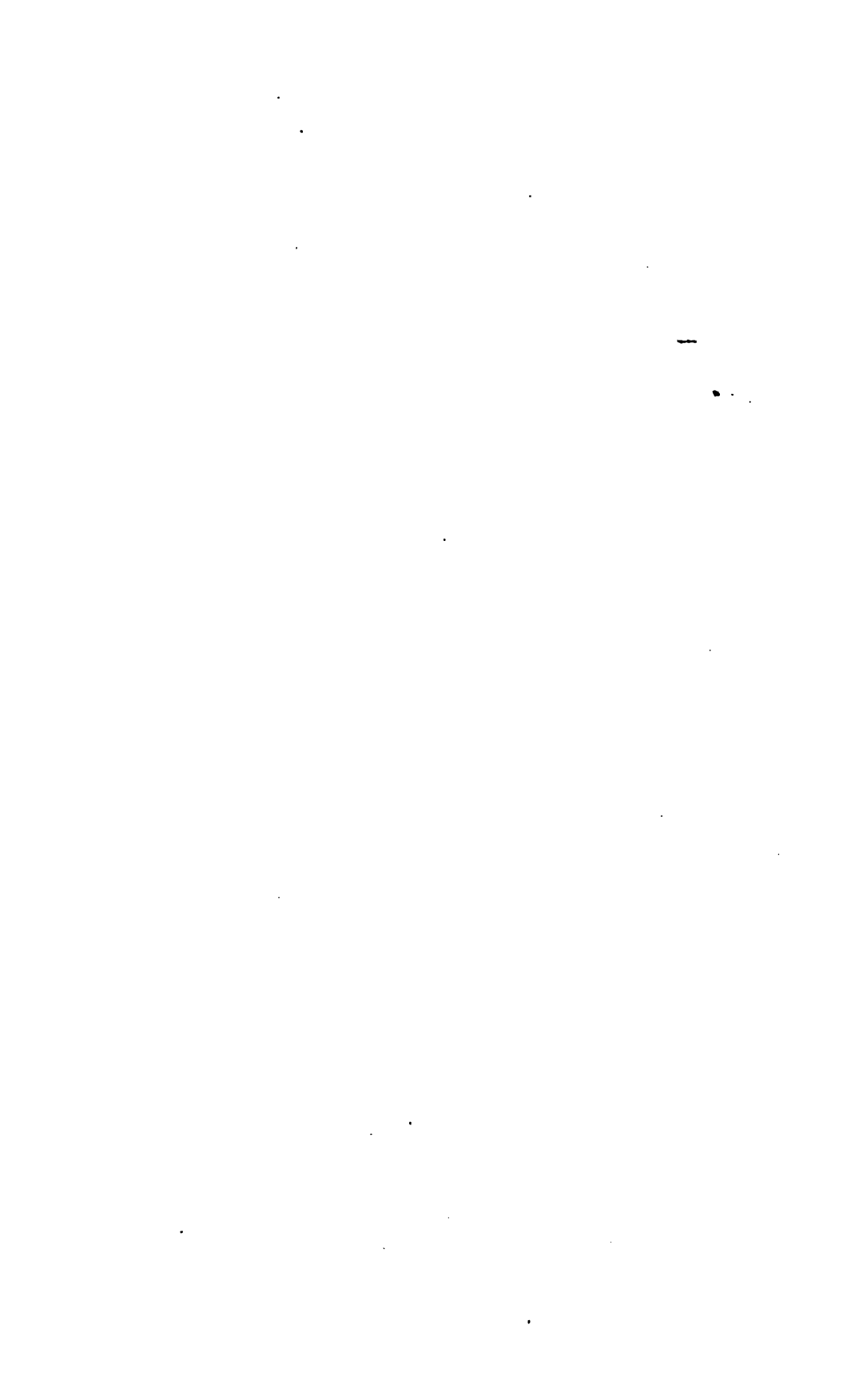
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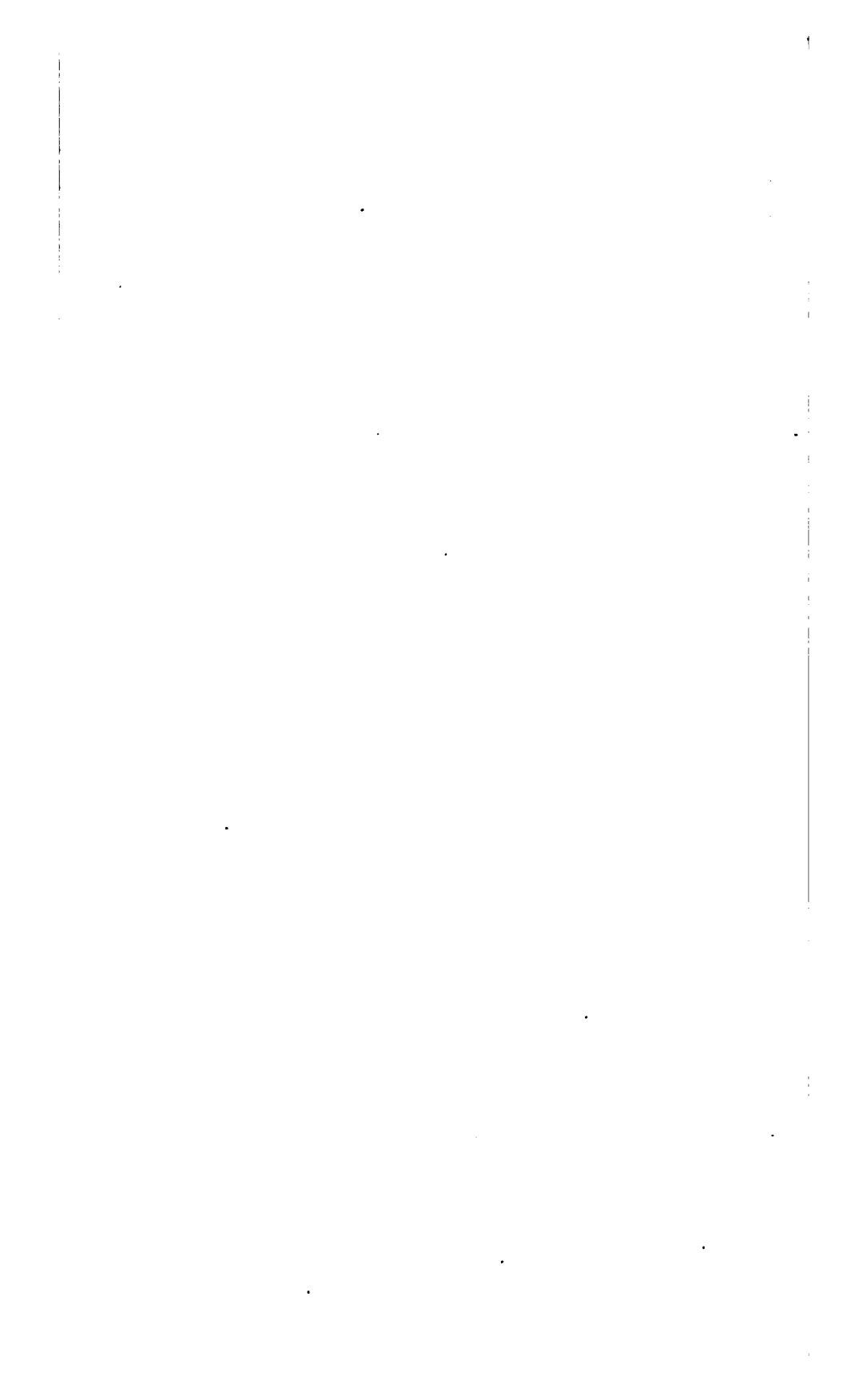
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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES,
FOR THE
SEVENTH JUDICIAL CIRCUIT.

BY
JOSIAH H. BISSELL,
OF THE CHICAGO BAR,
OFFICIAL REPORTER.

VOL. V.—1851-1874.

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JUDGES,

SITTING IN THE SEVENTH CIRCUIT, 1869-1874.

HON. DAVID DAVIS,

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

Alloted to the Seventh Circuit. Appointed December 8, 1862.

HON. THOMAS DRUMMOND,

CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT.

Appointed December 22, 1869. District Judge since February 19, 1850.

HON. ANDREW G. MILLER,

DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN.

Appointed June 12, 1848. Resigned November 11, 1873
Deceased September 30, 1874.

HON. SAMUEL H. TREAT,

DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Appointed March 3, 1855.

HON. WALTER Q. GRESHAM,

DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.

Appointed December 21, 1869.

HON. HENRY W. BLODGETT,

DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.

Appointed January 11, 1870.

HON. JAMES C. HOPKINS,

DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WISCONSIN.

Appointed July 9, 1870.

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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.

SEVENTH JUDICIAL CIRCUIT.

GEORGE W. LAW vs. SAMUEL WILGEES.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—MARCH, 1851.

1. **RESTRAINING WASTE.**—In Wisconsin, under the Revised Statutes of 1849, the holder of a certificate of sale of land on execution cannot maintain a bill to restrain waste. He has neither title nor right of possession until his deed is issued.

2. The laws for the sale of lands upon execution contain the whole system, and the court cannot supply any supposed deficiencies.

Isaac N. Stoddard, for plaintiff.

I. The chancery jurisdiction to restrain waste has grown up in England, while the statute of Gloucester, 6 Edward I., chapter 13, provides another remedy. 1 Fonblanque's Equity, 31, and note; 3 Blackstone's Commentaries, 225.

II. Complainant has as good a right to this remedy as a

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mortgagee, and that they are entitled thereto, *Farrant vs. Lovel*, 3 Atkyns, 723; *Brady vs. Waldron*, 2 Johnson's Chancery R., 148.

III. The power is discretionary with the court, and it is exercised in cases of waste, when no action at law would lie. *Kane vs. Vanderburg*, 1 Johnson's Chancery, 11; Eden on Injunctions, 201, 202.

IV. The statute creates the *right*, even if it did not exist at common law, and this court may *enforce* it, if agreeable to general principles of equity. Equity does not get its jurisdiction from statutes; if they give a *right* it will administer it. *Lorman vs. Clarke*, 2 McLean, 568; *Bodley vs. Taylor*, 5 Cranch, 191:

V. Courts issue injunctions *ex equo et bono* where a party is entitled to relief. Authority for their issuance does not proceed from statutes.

Finch & Lynde, for defendant.

MILLER, J.—The plaintiff alleges that he obtained judgment against this defendant, Samuel Wilgees, in the District Court of the United States, and thereupon issued an execution and levied on certain lands in his bill described, which he purchased at the sale of the marshal made by virtue of said writ, for the sum of \$4,000, and that the said marshal gave him a certificate of sale according to law; that the said lands are pine-timbered lands, and that much of its value consists in the timber; and that he believes that if the pine and other trees should be felled, or cut down, or taken off of said lands, the said lands would not be worth as much by at least \$2,000 as if left thereon, but if allowed to stand and remain on said lands under and pursuant to said certificate of sale, the same would be worth the said \$4,000 and lawful interest from the time of said sale. The bill then charges the defendant with cutting a large amount of pine timber off these lands and thereby committing waste.

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Samuel Wilgees, the principal defendant, in his answer, denies that he is engaged in cutting timber, further than that previous to the day of the sale he had entered into a contract to deliver logs at the saw-mill, and that the timber now being cut is in pursuance of such contract; and he declines to give copies of such contract or explain the consideration thereof; that the lands and premises are worth \$10,000 and would be worth that sum if the pine timber were cut off; and that he is using the property in the same manner he did before the sale; and that he is furnishing the logs, etc., for the purpose of raising money to redeem the lands.

The first point to be determined is as to the jurisdiction of the chancery side of this court.

There is no doubt of the decisions in the state of New York in favor of the injunction to stay waste at the instance of a purchaser in pursuance of the statute.¹ The statute of that state expressly authorizes an order for that purpose, which may issue in the form of an injunction.

How is it in Wisconsin?

By section 100, chapter 102, of Judgments and Executions, Revised Statutes 547, "The right and title of the person against whom the execution was issued, to any real estate which shall be sold thereby, shall not be divested by such sale until the expiration of twenty-seven months from the time of sale; and if such real estate shall not have been redeemed as herein provided, and a deed shall be executed in pursuance of a sale, the grantee in such deed shall be deemed vested with the legal estate from the time of the sale on such execution, for the purpose of maintaining an action for any injury to such real estate." It is very clear that the defendant is allowed, by this section, to retain the title and the possession of his lands sold upon execution for the term of twenty-seven months, and also, until the expiration of this term, the pur-

¹ *Boyd vs. Hoyt*, 5 Paige, 65; *Bank of Utica vs. Messereau*, 7 do., 517; *Talbot vs. Chamberlain*, 3 do., 219.

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chaser obtains neither the title, the possession, nor the right of possession. But if the property should not be redeemed by the payment of the amount bid and interest, then the purchaser may obtain a deed, and consequently the right of possession; and by virtue of said deed he may be deemed vested with the legal estate from the time of the sale on the execution for the purpose of maintaining an action for any injury to such real estate. There is no authority given here to the purchaser to maintain a suit for waste until he acquires title, when he may sue for all damages committed from the day of sale.

Section 8, chapter 109, of Waste, page 582, allows an order against a defendant in an execution or attachment levied on land, restraining him from committing waste on lands so levied upon or attached, at the instance of the plaintiff in such process. By section 9, "Whenever any lands shall be sold on an execution, the person to whom a certificate of sale may be executed by the sheriff, pursuant to such sale, may maintain an action on the case for waste against any person, for any waste committed by such person on the premises after such sale." Before the sale of these premises this complainant could obtain an order as plaintiff in the judgment and execution, restraining the defendant from committing waste; but after the sale he ceased to be such plaintiff and became the person to whom the certificate of sale is given as the purchaser, in pursuance of section 9. This section does not authorize the order, but merely permits an action on the case. The damages recoverable by virtue of this section are in the nature of a penalty. Why the legislature made the distinction in the two sections I cannot imagine, for the holder of the certificate should be as much entitled to an order to restrain waste as the plaintiff in the judgment or execution, but we must take the law as it is. Without this section 9, the purchaser could not proceed at law for waste or injury to the freehold until he obtained his deed. This section allows him some redress in the meantime. The two laws are not

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inconsistent, but are cumulative of the remedies such as they are.

In the absence of statutory authority can the holder of the certificate of sale put in motion the chancery side of this court? It is contended that section 17 of chapter 100, of Waste, confers this power. That section provides that "the circuit court for each county shall have equity jurisdiction of all matters concerning waste in which there is not a plain, adequate, and complete remedy at law; and may grant injunction to stay and prevent waste." This section confers upon the circuit court the jurisdiction of a court of equity in all matters concerning waste, in which there is not a plain, adequate and complete remedy at law; but it does not say who may claim this authority of the court. It does not expressly authorize either a judgment creditor or attaching creditor, or the holder of a certificate of purchase of lands at sheriff's sale. Then we must see who are entitled to put this side of the court in motion. In the absence of legislative authority, the complainant in the bill for injunction to restrain waste ought to show a good title to the land, and he must either have the possession, or the undisputed right to possession.¹ Now it is well settled that a judgment creditor or attaching creditor has no title to the land. Neither has the holder of a certificate of purchase any title or right to the possession of land until he obtains his deed, after the expiration of the time for redemption. They do not stand in the light of either mortgagees or mortgagors. A mortgagee is in the nature of a purchaser, and the waste lessens his security, and the mortgagor is the legal owner of the land. The land described in a mortgage is specially appropriated by the voluntary act of the parties as security for a certain debt, which equity will preserve and protect, while a

¹ *Storm vs. Mann*, 4 Johnson's Chancery, 21; *Hough vs. Martin*, 2 Devereux & Battle's Equity, 379, 385; *Graden vs. Winfield*, 5 J. J. Marshall, 196; 1 Fonblanque's Equity, 31, note p.

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judgment or attaching creditor is pursuing the lands adversely to the defendant, and the purchaser is considered a mere volunteer, without the request or contract of the defendant, and equity leaves both to their legal rights and remedies. The laws for the sale of land upon execution must contain the whole system within themselves, and the court cannot legislate to supply any supposed defects therein. Where relief in equity cannot be granted upon principles controlling and regulating the exercise of equity jurisdiction, the section referred to does not vest jurisdiction in the circuit courts. As the statutes have not authorized this proceeding, either at law or in equity, the injunction is not allowed.

For the present statute concerning waste, which has taken the place of the one upon which this decision was founded, though following most of its provisions, see 2 Taylor's Statutes of Wisconsin (1871), 1695, §9.

For the present statute, as to redemption from sales of lands under execution, consult same volume, p. 1557, *et seq.*

For a full discussion of the subject of injunctions to stay waste, with numerous citations of authorities, consult High on Injunctions, Chapter IX.—[Reporter.]

Freeman vs. Stewart.

ALEXANDER H. FREEMAN vs. NORMAN STEWART
AND FRANCIS M. STEWART.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—AUGUST TERM,
1855.

IN EQUITY.

1. Homestead exemption must exist and be claimed at the time the writ comes to the officer's hands. A defendant, moving onto property there after cannot hold it exempt as a homestead.

2. PRACTICE.—A creditor's bill having been filed, and a receiver appointed the court will direct the assignment of such property to the receiver.

MILLER, J.—The judgment in this case was rendered against Norman Stewart on the 6th of July, 1854.

By the answer to the supplemental bill, it appears that lot 3 in block 4 in the town plat of Dell Creek, was formerly owned by Francis M. Stewart, and it was given by him in the spring of 1854 to the said Norman Stewart, on condition that he would build a house thereon and improve the same. The title to the lot is now in Norman Stewart and was in him at the time of filing the supplemental bill.

The execution issued upon the judgment against Norman Stewart on the 18th of July, 1855, twelve days after the rendition of the judgment. If the marshal had levied upon this lot and the building then in process of erection, there is no question but the levy and sale would be good; for by the law,¹ lands, tenements and real estate holden by any one in trust or for the use of another, shall be liable to debts, judgments, decrees, executions and attachments, against the person to whose

¹ Revised Statutes, 542, §65

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use they are holden. Defendants then had an equitable interest in the lot and building subject to sale, and also the subject of a bill in equity for the perfection of the title before a sale by the marshal. It could not have been then claimed under the exemption law, for the defendant was not in the actual occupancy of it as a homestead. He was not then a householder in the occupancy of the premises within the meaning of the exemption law. By the law the lien of this judgment attached to the defendants' interest in this lot, and it was also subject to levy and sale upon the execution, as I before stated, and it might have been levied under that execution, before the defendant had moved upon it. The question arises now, in regard to the remedy of the plaintiff and also the rights of the defendants under the exemption law. The defendant moved into the house in September, 1855, after the return of the execution *nulla bona*. The original bill was filed November 23, 1854. Suppœna was served November 29th. December 5th, injunction was allowed, and served on the 19th. A receiver was appointed January 6, 1855. The supplemental bill was filed May 7, 1855.

In his answer the defendant says, "In my absence in the pinery, he (Francis) had deeded the lot to my wife. On my return, shortly after, I got a deed of it. I first saw it in the spring. I returned from the pinery in April last, the middle or latter part. My wife has since executed a deed to King and he to me, the last of April or first of May."

The use and object of the judgment creditor's bill is to discover assets and to render the equitable property or interests and the choses in action of the defendant subject to his debts. In other words, it is to compel a defendant to do that which he in honesty to his creditors should do fully and freely to the officer serving the execution. If the defendant had turned out his interest in this house and lot to the marshal, subject to his right of exemption, the question as to the right would have been raised upon a motion to set aside the levy; and it would have been raised just as effectually and as favorably to the in-

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terests of the parties as it is now by the defendant's refusal to assign it.

The question then arises out of the occupancy by the defendant and his family, before the filing of this bill.

I have remarked that the judgment was a lien on the defendant's interest, which was subject to levy under the execution by the marshal. The defendant cannot conceal from the officer property which he was not occupying and then, in answer to the bill, say that "since the officer served me with the execution I have moved on the property, and I now claim it for my homestead exemption." To allow this, would be sanctioning a fraud upon the plaintiff. The homestead, by the law, must be claimed when the levy is made. When the levy might have been made, the defendant had not placed himself in a position to claim the exemption. The claim of exemption must have relation to the time when the execution was in the marshal's hands. No return of the property is made by the defendant to the marshal, or even in his answer to the original bill, and when a bill is filed expressly to have this lot and house appropriated by a decree of this court to the plaintiff's debt, it is too late for the defendant to interpose a claim of exemption.

Whether a defendant can dispose of his estate and property, reducing it to the exemption limit, and then successfully claim an exemption, I shall not now determine. The case of *Brackett vs. Watkins*, 21 Wendell, 68, is opposed to such a proceeding.

The court will instruct the master that this house and lot is to be assigned to the receiver.

See further as upholding the text, *Upman vs. Second Ward Bank*, 15 Wisconsin, 449.

If the judgment debtor sells the land, held as a homestead, or ceases to use it, the lien attaches and it may be sold to satisfy the judgment. *Hoyt vs. Howe*, 3 do., 752.

Chattels levied upon are exempt if claimed early enough not to delay sale or necessitate new advertisements. *Post vs. Heffner*, 69 Pennsylvania State, 68.

Consult *Pratt vs. Burr*, *post p.* 33. —[Reporter.

Bonnell vs. Weaver.

ALEXANDER BONNELL ET AL. vs. F. M. WEAVER.**CIRCUIT COURT.—DISTRICT OF WISCONSIN.—APRIL, 1856.**

1. Judgment in vacation cannot be entered unless in pursuance of a positive statute, whose provisions must be fully complied with.

2. **COGNOVIT.**—In Wisconsin, the authority to confess the judgment must be in the statutory form, and be produced before the officer entering the judgment.

3. Equivalent provisions cannot be substituted by the court, for the positive statutory provisions.

4. **VACATING JUDGMENT—COURT MAY ENTER NEW JUDGMENT.**—It is competent for the defendant to move to vacate the judgment, and also for the court thereupon, the proper papers being before it, to render a new judgment and issue execution.

MILLER, J.—These three suits were commenced by attachment, with affidavits annexed, and before the marshal had taken an inventory, the defendant gave to the plaintiffs in such case a cognovit, whereby he confessed the debt and consented that a judgment might be entered immediately and an execution be issued upon the judgment. There was no express authority from the defendant to the clerk to enter the judgments in vacation, but they were entered in vacation, and executions were issued and served by seizing the defendant's goods in store. The defendant has moved the court that the entry of judgments in these cases be vacated and the executions set aside for the reason that the judgments are irregular and void. The reason is not specified, but we understand that these judgments were entered on the docket in vacation without lawful authority.

Revised Statutes, 534, 535 and 536, are copied from the statutes of the state of New York, called the Revised Statutes of that state, in 1829. Section 13, provides that "Judgments may be entered in vacation as in term upon a plea of confession

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signed by an attorney of such court, although there be no suit then pending between the parties, * * * if the following provisions be complied with, and not otherwise." Then the provisions are specified, which are not pursued in these cases. The reading of this section is this: "Although there be no suit then pending between the parties, judgments may be entered in the supreme or in any court of record in vacation as in term upon a plea of confession signed by the attorney, if the following provisions be complied with, and not otherwise."

The federal courts, in pursuance of acts of Congress, recognize the laws of the states in regard to the entering and recording of judgments and these liens. They are rules of property which the federal courts must observe. It would work great confusion to have one set of laws regulating property as to its title in this court and another in the state court. We then pursue in this particular the statutes of the state.

A judgment is the sentence of the law pronounced by the court; but the court can only be held in term time as may be prescribed by law, and for the purpose of entering judgments has no existence in vacation; consequently, a judgment cannot be entered in vacation unless in pursuance of a positive statute, whose provisions must be complied with.

Under the old system in New York, judgments were entered in vacation upon *cognovit*, but whether before or after the first term does not appear.¹ I have not been able to find a case since the Revised Statutes of 1829, but in 1840 (Laws of 1840, page 334, §23) it is provided that "judgments may be entered and perfected at any time in term or vacation." We have no such provision in this state.

In England, judgments may be perfected after the term, even in vacation, and may be entered even without declaration.

The following points are ruled here:

1. No statute is necessary to enable the court to enter a

¹ *Arden vs. Rice*, 1 Calne's Reports, 498; *Hogeboom vs. Genet*, 6 Johnson, 325.

judgment, although the court will follow the forms of practice prescribed by statute as the rules of this court in the absence of a statute.

2. As the court is only in legal existence to exercise judicial power at such times as may be prescribed by law, a positive statute is necessary to authorize an entry of a judgment in vacation. And then it is only a nominal judgment or statute lien.

3. To make a judgment entered in vacation valid against the defendant, all the forms prescribed by law must be substantially complied with.

4. The cognovits in these cases are not a compliance with the provisions of the statute. They are not signed by an attorney of this court. The authority for confessing such judgments was not in any proper instrument, nor was the authority produced to the officer signing the judgment.

5. A court of law cannot substitute equivalents for positive statutory provisions, when the statute directs that these provisions shall be observed, and not otherwise.

6. These cognovits are confessions of the debt and an authority to the court to enter judgment immediately; that is, whenever they are brought into court. They are no more than if the defendant came into court in his own proper person and acknowledged judgment *ore tenus*.

7. It is competent to the defendant to move that these judgments be vacated.

8. The court can now proceed after the vacation of the judgments, to render judgments upon those cognovits and to issue executions.

9. The court cannot now determine whether these plaintiffs have any rights by reason of the verbal arrangements stated in the affidavit of Mr. Van Dyke, to the exclusion of the other execution creditors. But if such right be claimed, it will have to be ascertained after the proceeds of sale are brought into court

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for distribution, which may be done by a rule upon the marshal, or the marshal may bring the money in of his own accord and ask the court to distribute it.

10. These three judgments will now be vacated and the executions set aside.

11. If judgments be now entered and executions be issued, there need not be a new advertisement, as there are other executions in the marshal's hands, upon which the property seized has been advertised for sale.

See further that a judgment cannot be entered by the clerk of court except in pursuance of positive provisions of statute. *Holmes vs. Lewis*, 2 Wisconsin, 88.

And see *Hampstead vs. Drummond*, 1 Pinney (Wis.), 534, decided by Miller J., when a Justice of the Supreme Court of Wisconsin.

A judgment by confession entered upon warrant of attorney in vacation must be signed by a judge or court commissioner. *Remington vs. Cummings*, 5 Wisconsin, 138.

A judgment entered by the clerk of court upon warrant of attorney, in 1855, and not signed by a judge or court commissioner, was void and could not be afterward amended by the court by adding such signature so as to give it a retroactive effect. *Fairchild vs. Dean*, 15 do., 206.

As to the supervision a court of law will assume over a judgment entered by confession, consult *Brown vs. Parker*, 28 Wisconsin, 21.—[Reporter.

Phillips vs. Mariner.

**BENJAMIN F. PHILLIPS ET AL. VS. SAMUEL S.
MARINER.**

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—APRIL, 1856.

IN EQUITY.

BILL OF REVIEW.—Where on bill of foreclosure by the holder of two notes secured by mortgage, neither the bill nor decree accounted nor provided for the third note, a bill of review will lie by the defendants, even though the decree has not been executed.

MILLER, J.—Bill of review of a decree of sale upon mortgage given by Phillips to Gordon to secure three notes payable to Gordon or bearer. The decree was for the payment of two of the notes without any mention of the third—and the land, as described in the bill was in range 8, and in the decree in range 14. These are the principal objections to the decree. The bill sets forth that Chase, Perlieu, A. Grignon and Robert Grignon have or claim to have some interest in the land. The bill was taken as confessed against all the defendants. There was an appearance merely for Phillips. The bill of review is drawn in the names of all the defendants in the original bill, and is sworn to by the mortgagor Phillips.

To this bill the defendant Mariner has interposed a demurrer and a plea. The demurrer has been argued and submitted, and is now to be passed upon.

The first objection made to this bill, that the decree was not executed by the defendant, nor the amount paid, was disposed of upon the motion to dismiss the bill. A decree of foreclosure of a mortgage, and of a sale of mortgaged premises, is to be considered as the final decree; and the proceedings on the decree are a mode of enforcing the rights of the creditor. The original decree of foreclosure is final upon the

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merits of the controversy. Proceedings subsequent are a mode of enforcing a decree similar to an execution at law. It is not essential that the decree should be complied with, as, for instance, making a deed. In this case I thought the bill of review might be sustained upon the same principle as in the case of an execution executed.¹

The decree was not taken by consent expressed. It was made upon the bill taken as confessed, or upon default. So this objection fails.

The next objection is that the decree cannot be revised upon the application of the party not injured by it, and that the holder of the third note is not such a party.

It is true that an appeal or bill of review cannot be sustained by a party not affected by a decree, or not a party of record. The bill sets forth that Phillips made and delivered to Gordon two notes for \$800 each, payable in July, 1851, and 1852, and that the mortgage was given to secure \$2,400 according to the condition of three certain promissory notes of same date therewith. The first two of said notes are the notes hereinbefore described. The decree is for the two notes and interest, but no mention is made of the third, or whether it has been paid or not; now if these notes were delivered to the plaintiff as alleged in the bill, by the maker, he would know what became of the third note. This suit and decree are for two-thirds of the mortgage debt. If Mariner is the holder of the third note, it probably is satisfied by this decree. But if he is not the holder, it may be outstanding unsatisfied, and may be claimed as a lien upon this land as against the other defendants, as *terre* tenants. Those defendants are parties to this bill of review and are proper parties. A final decree cannot be made in equity until all the parties in interest are brought before

¹ *Massie's Heirs vs. Graham's Administrator's*, 8 McLean's Reports, 41; *Wiser vs. Blachly*, 2 Johnson's Chancery Reports, 488; Story's Equity Pleadings, §833.

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the court.¹ To obviate this difficulty in the courts of the United States, the bill should suggest the reason for not making other parties. In a suit demanding specific performance, all the co-hiers must be made parties or be accounted for.² It is a general rule in equity, that all persons materially interested in the matter of the bill as plaintiffs or defendants ought to be made parties to it, however numerous they may be. In *Finley vs. United States Bank*, 11 Wheaton 304, a subsequent mortgagee obtained a decree by written consent of the defendant without informing the court of a previous mortgage. The court remark: "It cannot be doubted that Coleman (the first mortgagee) ought regularly to have been a party defendant, and that had the existence of his mortgage been known to the court, no decree ought to have been pronounced in the case until he was introduced into it. But this fact was kept out of view until the decree was pronounced, the sale made, the money paid to the creditor and the report of his proceedings returned by the marshal. If the manner in which the sale was made and the money directed to be paid (to the plaintiff) be unusual and exceptionable, it was done by consent, and the error is not imputable to the court. The only question presented to the judges by this petition (which was a petition of the prior mortgagee to be made a party) was whether a decree completely executed by a sale of the property and payment of the purchase money should be set aside and the suit reinstated for the purpose of introducing a party who ought regularly to have been an original defendant, but who was not shown by any proceedings in the cause "to be concerned in interest until the decree was made and executed." If such a proceeding were "admissible in any case, * * * it must be where the mischief resulting from a rejection of the petition would be irremediable." In that case Coleman, the first mort-

¹ *Marshall vs. Beverley*, 5 Wheaton, 313.

² *Morgan's Heirs vs. Morgan*, 2 Wheaton, 290

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gagee, was not affected by the decree. In the case under consideration the court has notice, by the bill, of the third note included in the mortgage, and by the decree that the amount of that note is not therein included. If the fact had been brought directly to the notice of the court, the complainants would be required to account for the third note in some way, or the decree would have ordered a portion of the proceeds of sale to it. If that note is not in the hands of the plaintiff Mariner, the land still remains subject to that proportion of the incumbrance created by the mortgage.¹

A suit was brought by the assignee of a mortgage without making the mortgagee a party. A decree was entered for the plaintiff which was reversed with costs, with leave to amend.² The decree in this case for the amount of two notes without reference to the third is an error of record which should be corrected.

If the decree had directed a portion of the proceeds of sale to be applied to payment of the third note, it might have stood, for that note is entitled to its proportionate share of the proceeds. Instead of that Mariner, the original plaintiff, has received all. See *Donley, assignee, vs. Hays*, 17 Sargeant & Rawle, 400, and cases cited in the opinion. It is the duty of the court to avoid multiplicity of suits and to prevent irreparable injury, and for these reasons the bill should be maintained.

If a bill of review is improperly filed, the proper practice for the defendant is to move to strike it from the files; a demurrer admits that it is properly filed. *Griggs vs. Gear*, 3 Gilman, 2.

As to when bills of review will lie, consult 2 Daniell's Chancery Pleading and Practice, 1576, *et seq*; Story's Equity Pleadings, §404.

A bill of review cannot be sustained upon the ground that the court decided wrongly upon the evidence. *Webb vs. Pell*, 3 Paige's Chancery Re-

¹ *Stevenson vs. Black*, Saxton, 338; *Beta vs. Heebner*, 1 Penrose & Watts 280; *Langdon vs. Keith*, 9 Vermont, 299.

² *Morgan vs. Magoffin*, 2 Bibb, 395.

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ports, 368; *Marrigault vs. Deas*, 1 Bailey's Chancery Report, 283; *Turner vs. Berry*, 3 Gilman, 541; *Evans vs. Clement*, 14 Illinois, 206; *Garrett vs. Moss*, 22 Illinois, 363. And the error must be apparent upon the face of the decree, and the evidence will not be looked into. Story's Equity Pleadings, §405; *Dexter vs. Arnold*, 5 Mason, 803, 310; *Greenwich Bank vs. Loomis*, 3 Sanford, 70; Smith's Chancery Practice, 51. Mere error in the decree will not suffice. Adams' Equity, 417.

Before a bill of review can be filed, the original decree must, ordinarily, be performed. 2 Daniell's Chancery Pleading and Practice, 1582; Story's Equity Pleadings, §406; *Wiser vs. Blachly*, 2 Johnson's Chancery Reports, 488; *Griggs vs. Gear*, 3 Gilman, 316; *Horner vs. Zimmerman*, 45 Illinois, 14; Smith's Chancery Practice, 53; Adams' Equity, 417. The only exception to this rule is, where, on account of the insolvency of the parties to whom the money is to be paid, or other good reason specially shown, the rights of complainant would be lost by performance of the decree; but in such case, the special reason must be shown in the bill, and leave of the court first obtained to file the bill without performance of the decree. See cases above cited.

And even if the time for the payment of the money under the original decree had not arrived at the time of filing the bill of review, it must be paid when the time does arrive, or the bill will be dismissed on motion. 2 Barbour's Chancery Practice, 96; *Partridge vs. Usborne*, 5 Russell, 196, 251; Welford on Equity Pleadings, 90.

On a bill of review, the court will only consider the law upon the facts as furnished by the original decree; it will not perform the functions of an appellate court. *Evans vs. Clement*, 14 Illinois, 208; Story's Equity Pleadings, §407.

If a party neglects to make his defense at law, a court of equity will not relieve him. *Mors vs. Bagley*, Breese, 94; *Beuigenau vs. Turcotte*, Id., 167; *Hubbard vs. Hobson*, Id., 190; *Richardson vs. Provo*, Id., 216; *Duncan vs. Ingles*, Id., 277; *Armstrong vs. Caldwell*, 2 Scammon, 418; *McDaniel vs. James*, 23 Illinois, 407; *Finch vs. Martin*, 19 Illinois, 11; *Thompson vs. Morris*, Illinois Supreme Court, 1878, 5 Chicago Legal News, 803.—[Reporter.]

Richardson vs. Mattison.

RICHARD J. RICHARDSON vs. HENRY C. MATTISON.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—APRIL TERM, 1857.

IN EQUITY.

1. COLORABLE CONVEYANCE TO CONFER JURISDICTION—PRACTICE.—The defendant, after judgment in ejectment and new trial allowed, cannot maintain a bill for discovery whether the conveyance to plaintiff was not merely colorable, and made in order to give this court jurisdiction.

2. *It seems*, that the proper practice is to move for leave to file a plea in abatement, supported by affidavit showing that plaintiff, at the time he went to trial on the merits, did not know the facts concerning the alleged colorable conveyance.

MILLER, J.—The defendant has an ejectment suit pending in his name against Richardson. Mattison was, at the commencement of the suit, a citizen of the state of New York. In the ejectment suit, the defendant pleaded the general issue, and there was one trial, which resulted in a verdict for the plaintiff. The defendant has applied for a second trial under the statute. Since then this bill is filed for discovery whether the conveyance was not made by one William M. Tallman, a citizen of Wisconsin, to Mattison, for the purpose of obtaining the jurisdiction of this court. In *Maxwell vs. Levy*, 2 Dallas, 381, the fact that the deed was collusive, and for the mere purpose of conferring jurisdiction, was obtained from the answer to a bill of discovery, and on motion, the cause on the law side of the court was dismissed. Cases between the same parties were also dismissed in the same way in 4 Dallas, 338. These were rulings of the Pennsylvania Circuit Court at an early day, before the practice was well established. In *Smith vs. Kernochen*, 7

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Howard, 198, the Supreme Court decided that the objection to this jurisdiction must be taken by plea in abatement, and cannot be raised in the trial on the merits. Enough is set forth as to the citizenship of the parties in the record to give jurisdiction; but the true and only ground is, that the grantor is the real party plaintiff, and the plaintiff in the record is merely nominal and colorable, his name being used merely for the purpose of jurisdiction. If such is the case, the suit at law is a controversy between citizens of this state, and jurisdiction, of course, cannot be upheld. The difficulty is, how the plea in abatement can be got in at the present state of the record. If it can be got in, it must be by motion and affidavit setting forth that the fact was not known to the defendant when he filed the plea of the general issue and went to trial. Upon that state of facts the court might allow the plea to be filed. But the bill does not state this fact, and for want of it, it is clearly defective. The complainant, I think, should adopt this practice as the only available one in the present state of the record.

The motion for an injunction to restrain the suit at law is overruled.

See further, that a colorable conveyance, expressly to give a party the requisite citizenship to sue in the Federal Courts, will be disregarded, and the citizenship of the real party in interest will govern. *Barney vs. Baltimore City*, 6 Wallace, 280.

Where a defendant has pleaded to the merits, and subsequently ascertains that plaintiff has not the requisite citizenship he may have leave to withdraw his plea in bar and file one to the jurisdiction; see *Eberly vs. Moore*, 24 Howard, 147, where the authorities are elaborately collated by counsel.—[Reporter.]

WILLIAM W. CAMPBELL vs. JOHN W. MEDBURY**ET AL.****CIRCUIT COURT.—DISTRICT OF WISCONSIN.—JULY TERM, 1857.****IN EQUITY.**

DEFECT IN TITLE—RELIEF TO PURCHASER.—A purchaser in undisturbed possession will not be relieved from payment of the purchase money on the ground of defect of title, there being no fraud or misrepresentation. He must rely upon his covenants.

MILLER, J.—This bill is for the foreclosure of a mortgage.

Martin B. Medbury, for himself and his co-defendants, filed a joint and several answer. In said answer it is admitted that John W. Medbury purchased the land described in the mortgage and bill, of Samuel Starkweather, about the 12th of October, one thousand eight hundred and fifty-one, and to secure the payment of a part of the purchase money, said John W. Medbury executed and delivered to said Starkweather his bond and the said mortgage, as alleged in the bill. The defendants further say that the conveyance to said Medbury from said Starkweather was by a full covenant warranty deed; and the defendants have recently and since the commencement of this suit, been informed and believe that at the time said conveyance was made, a portion of the lands so conveyed, and as described in the answer, had been sold for the taxes of the year eighteen hundred and fifty; and that deeds of the same have since been duly executed, issued and delivered by the clerk of the board of supervisors of Manitowoc county, and are recorded in the office of the register of deeds of said county, and now exist as valid outstanding titles to said premises, as these defendants have been informed and believe to be true.

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This case is to be disposed of upon the answer, which is to be taken as true.

I shall not inquire whose duty it was to redeem the land from the tax sale—whether it was first the duty of the purchaser and mortgagor in possession to redeem, or of the vendor and mortgagee out of possession. Under the law, there is no doubt but either of them could redeem the land so sold before the execution, delivery and rendering of the tax deed. The provision of the laws for the redemption of land sold for taxes is to be liberally construed.

The answer sets forth that the mortgage was given to secure a portion of the purchase money of land conveyed by a full warranty deed by the mortgagee to the mortgagor. It does not plead an eviction; nor is it alleged that the grantor is insolvent. The relief claimed by the answer is exclusively upon the alleged defect of title of a part of the land so conveyed and mortgaged.

It is not considered necessary to examine the numerous authorities upon this subject, for the purpose of proving that a court of equity cannot grant relief upon the ground of defense contained in the answer. Where the contract is executory the vendee may obtain a rescission if the vendor has no title; but where the contract is executed as in this case, eviction or fraud must be shown to enable a court of equity to grant relief to the purchaser, or to restrain the collection of the purchase money.¹ The decision of the case of *Patton vs. Taylor*, 7 Howard, 133, settles this case. In the opinion, the court remark, "These cases will show that the purchaser, in the undisturbed possession of the land, will not be relieved

¹ *Simpson vs. Hawkins*, 1 Dana (Ky.), 303; *Gale vs. Conn*, 3 J. J. Marshall, 538; *Wiley vs. Fitzpatrick*, *Id.*, 582; *Campbell vs. Whittingham*, 5 *Id.*, 96; *Thompson vs. Jackson*, 3 Randolph, 504; *Taylor vs. Lyon*, 2 Dana, 376; *Luckett vs. Triplett*, 2 B. Monroe, 39; *Edwards vs. Morris*, 1. & II. Ohio, 239; *Bumpus vs. Platner*, 1 Johnson's Chancery, 213-218; *Abbott vs. Allen*, 2 *Id.*, 519; *Gouverneur vs. Elmdorf*, 5 *Id.*, 79.

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against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation, and that, in such a case, he must seek his remedy at law on the covenants in his deed; that if there is no fraud, and no covenants to secure the title, he is without remedy, as the vendor, selling in good faith, is not responsible for the goodness of his title beyond the covenants in the deed; and, further, that relief will not be afforded, even on the ground of fraud, unless it be made a distinct allegation in the pleading, so that it may be put in issue." As this case is so clearly settled by the decision of the Supreme Court of the United States, a decree must be rendered in favor of the complainant.

The question here presented and the leading cases *pro* and *con* are elaborately discussed and collected in Rawle on Covenants for Title 583, *et seq.* (4th Ed.), from which he deduces the established doctrine that where the purchaser has not been evicted and there has been a total failure of title, he cannot detain the purchase money, but where there has been an eviction, he may.

The case of *Frisbes vs. Hoffnagle*, 11 Johnson, 50, which is directly opposed to the text, has been repeatedly overruled. Consult, also, 1 Parsons on Bills and Notes, 210, notes *o* and *p*; 2 Kent's Commentaries, 471-2, and notes. See *Vincent & Bertrand vs. Morrison*, 1 Breese (Illinois), 227, note 2, where there is an elaborate collection of authorities; and see *Vining vs. Leeman*, 45 Illinois, 246, holding the general doctrine.—[Reporter.

Pratt vs. Burr.

SAMUEL F. PRATT ET AL. VS. JOHN C. BURR, MOR-
GAN CRAIG ET AL.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—SEPTEMBER TERM,
1857.

IN EQUITY.

1. HOMESTEAD EXEMPTION does not protect a defendant in property taken in exchange for goods transferred in fraud of his creditors.
2. The privileges of a Homestead Act may be forfeited by fraud.
3. WRIT OF ASSISTANCE will be granted when the defendants refuse to surrender under the decree.

MILLER, J.—The complainants recovered a judgment in this court against John C. Burr and Morgan Craig, on which a *fi. fa.* was regularly issued. After the return of the execution unsatisfied, a judgment creditor's bill in equity was filed. In said bill it is charged, in substance, that the defendants had been merchandizing in Beloit, in this state, and while so engaged they contracted this debt in the purchase of goods, which were by them put into their store; that the defendants, in order to hinder or delay their creditors, transferred their stock of goods, including the goods so purchased of the plaintiffs, or such part of them as were then remaining, and received in part payment a house and lot and premises in Beloit; and that those premises are claimed by the defendants to be exempt from sale, under the homestead exemption law of the state. The bill was taken as confessed against the defendants for want of an answer. The receiver, in pursuance of an order of court for that purpose, sold the premises, which sale was confirmed by the court, with an order that possession be delivered to the purchaser. The

family of Burr are in possession, and refuse to surrender the possession, claiming to hold under the exemption law. Application is made for a writ of assistance.

It is contended that the premises are exempt from sale under any circumstances, by reason of the peculiar phraseology of the law. The law reads that "a homestead shall not be subject to forced sale on execution or any other final process from a court." This is an exemption from sale of a homestead, and is literally the same, and is to have the same force and effect as if the law read that "a homestead shall be exempt from sale on execution or any other final process." The legislature certainly did not intend that the law should be so administered that a party could not waive this exemption as a personal privilege, either by contract or by a surrender to the officer, or by neglect to claim it before sale, or forfeit it by a fraudulent reduction of visible property to an amount within the limit of exemption. If such a construction of the law as is contended for in this case should prevail, its title should be read, "An act for preventing the payment of honest debts, and for the promotion of frauds upon creditors by debtors." It is unnecessary to refer to authorities to prove that exemption laws are grants of personal privileges to debtors which may be waived by contract, or surrender, or neglect to claim before sale, and may be forfeited by fraud; but I will merely refer to *Hewes vs. Parkman*, 20 Pickering, 90; *McKinney vs. Reader*, 6 Watts, 34; *Hutchinson vs. Campbell*, 1 Casey, (Penn.) 273; *Lauck's Appeal*, 12 Harris, (Penn.) 426; *Hammer vs. Freese*, 7 *Id.*, 255; *Bowyer's Appeal*, 9 *Id.*, 210; *Case vs. Dunmore*, 11 *Id.*, 93; *Brackett vs. Watkins*, 21 Wendell, 68.

It is contended that the construction here put on the law is not according to its intent and meaning, by reason of the provision that, "such exemption shall not affect any laborer's or mechanic's lien, or extend to any mortgage thereon lawfully obtained; but such mortgage or other alienation of such land by the owner thereof, if a married man,

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shall not be valid without the signature of the wife to the same." This, in my opinion, does not require a different construction of the law from that here given. The legislature could not, by a law, prevent the acquisition of property directly, nor can they do it indirectly, by a legal prohibition of sale. This provision is intended to protect the wife and family of a mortgagor in a home. Without this law, the mortgage of a married man without his wife's signature did not affect her dower right, this mortgage being good against the mortgagor. Under this law a mortgage would be valid against the husband, the mortgagor; but the court, in a decree, would not disturb the occupancy of the wife and the family, nor of the mortgagor as long as claimed, and might not possibly decree a sale during such occupancy. The provision only means that a mortgage without the signature of the wife, shall not be valid against the exemption of a homestead; which is the subject of the law. With the exception of a mortgage or other alienation, the debtor is left free to waive, or claim, or forfeit the exemption, the same as if this provision had not been incorporated into the law. The following section requires the debtor claiming the exemption to demand a survey *at the time of making the levy*. If such duty should be neglected by the debtor before a sale, the exemption should be considered as waived; for the court could not prejudice the interests or affect the rights of a judgment creditor and of a purchaser by setting aside a sale for such neglect of the judgment debtor. This section sustains the construction here given of the first section of the law.

The defendants were merchants, in possession of a stock of goods, and in that character and under those circumstances, replenished their stock by the purchase of goods of the plaintiffs upon credit. After acquiring possession of the goods so purchased they transferred their whole stock in fraud of their creditors, and took in exchange therefor these premises. The mere statement of the facts decides this case in the

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conscience of every honest man; that neither in law nor justice the exemption should be allowed. The defendants cannot expect the court to assist them in consummating the intended fraud. A party cannot turn that which is granted him for the comfort of himself and family into an instrument of fraud.

It is declared in the bill of rights, as part of the constitution of the state, that "the privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a *reasonable amount* of property from seizure or sale for the payment of every debt incurred." This general declaration is proper and right; but the policy and moral effect of the law under consideration exempting property of *unlimited amount* are, at least, questionable. In many instances, the law amounts to a prohibition of the collection of a debt, while the debtor enjoys the occupation of premises amounting to a fortune. But be the effects of the law what they may, this court has administered it according to its true intent and meaning, giving to every one such rights under it as its terms and conditions plainly direct. But a defendant cannot expect this court to consent that he may use the law as an instrument of fraud by claiming a homestead which he has fraudulently acquired in the manner presented in this case, or by voluntarily reducing his visible property to the amount of the exemption allowed by the law.

The writ of assistance will be issued.

In a case, however, where a deed of the homestead was set aside on bill filed by the assignee, as having been fraudulently made, HOPKINS, J., held that the homestead right re-attached. *Henry J. McFarland vs. Charles Goodman et al.*, July, 1874, to appear in subsequent volume of this Series.

See *Freeman vs. Stewart* Ante p. 19,—[Reporter.

SORAMUS L. BARRETT ET AL. vs. J. AUGUST KOELLA.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—SEPTEMBER TERM,
1857.

1. **FRAUDULENT PURCHASE AND SALE—ASSUMPSIT.**—Where a merchant has, by means of false representations, purchased goods for his store on credit and then sells his stock in fraud of his creditors, and the goods sold cannot be found, the vendor may bring assumpsit before the credit has expired.

2. **PRESUMPTIONS.**—Where such goods cannot be found, the presumption is that they have been sold and for cash. If it is shown that he took notes for part, the presumption is that the notes were negotiable

N. J. Emmons, for plaintiff.

Wm. P. Lynde, for defendant.

MILLER, J.—This suit is for money had and received. Plea non-assumpsit.

It was proven at the trial that the defendant, early in May last, applied to the plaintiffs, at their store in Chicago, to purchase goods upon credit to replenish his retail stock in Sank City, in this state, representing that he was possessed of property worth twenty thousand dollars over and above all his debts and liabilities. On these representations, he obtained a bill of goods to the amount of five hundred and eighty dollars, on a credit of six months. The goods were shipped to defendant at Sank City; and about the twenty-fifth of the same month he sold his stock of goods in fraud of his creditors, he being insolvent, taking in part payment a house and lot, and also two notes of the purchaser, for about fifteen hundred dollars. It was also proven that, upon search, these goods could not be found in the store; and the defendant, immediately after such fraudulent sale, absconded leaving his fam-

ily in the premises so received by him in part payment of the stock of goods. The house was put in at six thousand five hundred dollars. This suit was commenced by attachment before the time of credit had transpired.

The court charged the jury that "if the jury found that the defendant procured the goods of the plaintiffs by fraud, and he soon afterwards sold out his stock of goods and received notes of the purchaser therefor in part payment, then this action would lie, although the time of credit had not expired; that the presumption was that these notes were negotiable, from the defendant being in mercantile business and from the circumstances attending the sale; and if the goods so sold by these plaintiffs could not be found in the store, the presumption is that the defendant had sold them; and that this suit for money had and received would lie."

A verdict being rendered for the plaintiffs, the defendant moved for a new trial.

This suit will lie if the plaintiffs' goods were sold by the defendant; if they were not sold, the suit would have to be in trover or replevin.¹ To sustain the action, the goods must have been sold for money, or something which was received as money. A mere exchange of commodities or articles is not sufficient.² In regard to things treated as money, it has been held that this count may be supported by evidence of the defendant's receipt of bank notes, or promissory notes, or credit on account, in the books of a third person, or a mortgage assigned to the defendant as collateral security and afterwards purchased and bought in by him, or a note payable in specific articles or any chattel; but not where the thing received was stocks, goods, or any other article, unless in the understanding of the parties it was considered and to be treated as money,

¹ *Willet vs. Willet*, 8 Watts, 277; *Putnam vs. Wise*, 1 Hill, 284; *Osborn vs. Bell*, 5 Denio, 870; *Jones vs. Hoar*, 5 Pick, 285.

² *Doebler vs. Fisher*, 14 Sergeant Rawle, 179.

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or unless it was intended to be sold by the receiver and sufficient time had elapsed for the purpose.¹ Real estate is not a representation of money, and it not appearing that the real property was received as so much money, I did not allude in the charge to this portion of the consideration of the sale of the stock by the defendant.²

It is well settled that proof of the receipt of promissory notes by a defendant will support the count for money had and received, from their negotiability, they being representatives of money and compose part of the circulating medium.³ The proof is that two notes were given by the purchaser of the stock of goods to the defendant as part of the consideration. The defendant was in the mercantile business, where negotiable promissory notes pass as money and are constantly in use; and the defendant was putting off his property in fraud of his creditors, where he would the more readily take negotiable notes. For these two reasons, the court charged the jury that the fair and legal presumption is that the notes were negotiable; if they were not negotiable, the defendant might produce them at the trial. For the reasons above stated, and the non-production of the notes, I am of opinion that the verdict should not be disturbed for this reason.

The receipt of money by the defendant may be proven by circumstances. It is not necessary that the proof should be positive. This is an equitable action, and is sustained upon equitable as well as upon legal principles. Where goods are left in a store for sale and the storekeeper would neither produce them nor pay the price, it has been left to a jury to presume that the storekeeper had received the price of them.⁴

¹ 2 Greenleaf on Evidence, §118 and the cases there cited.

² See *Beals vs. See*, 10 Barr, (Penn.) 56-60.

³ *Ainslie vs. Wilson*, 7 Cowen, 662; *Rew vs. Barber*, 3 do., 272; *Cumming vs. Hackley*, 8 Johnson, 206; *Beardsley vs. Root*, 11 Id., 484; *Lewis vs. Luce*, 8 Wendell, 79; *Cameron vs. Clarke*, 11 Alabama, 259.

⁴ *Tuttle vs. Mayo*, 7 Johnson, 132; *Gray vs. Griffith*, 10 Watts, 481.

In this case there was no legal sale by these plaintiffs to the defendant of the bill of goods; he was in law a bailee of the goods, liable to surrender them to the plaintiffs on demand. An action of trover and conversion would lie; and upon proof that the goods could not be found in defendant's store, their conversion would be presumed, they having been purchased for the store. Upon the same principle does the law raise the presumption of their sale and the receipt of their price by the defendant. They were procured to replenish the stock of the defendant, and they are presumed to have been put into the store; and if not there, the legal presumption is that they have been sold by the defendant and their price by him received.

Motion for new trial denied and judgment upon verdict.

Consult *Wigand vs. Sichel*, 3 Keyes (N. Y.), 120, where it is held the vendor on discovering the fraud may sue for goods sold and delivered before expiration of the credit; see also Kerr on Fraud and Mistake, 327, 331, note by the American Editor.

Mr. Chitty says, "Where goods or other property *improperly received* by the defendant are saleable, it may under circumstances, and after a time, be presumed that he has sold the property and received money in return, provided that there be reasonable evidence that the defendant converted the same into *money*, but not otherwise," 1 Chitty on Pleading, 351 and notes.—[Reporter.

JOHN G. NELSON ET AL. VS. CHARLES S. FOSTER
ET AL.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—SEPTEMBER TERM,
1857.

ABATEMENT—ANOTHER ACTION PENDING.

1. Certificate of counsel that, in his opinion, the plea is well founded, need not accompany a plea of abatement in the federal court.

2. STATE COURTS.—The federal court will take cognizance of the constitution and laws of the state on the subject of her courts, and ascertain which are courts of general jurisdiction.

3. FORMER ACTION PENDING.—A plea of another action pending, in the usual form that the former suit was at the time of the commencement of this suit, and still is pending, is sufficient without alleging that the former suit was not discontinued before the plea was filed.

4. SUIT IN STATE COURT.—The pendency of a suit in a state court is a good plea in abatement in the federal court.

MILLER, J.—This is an action of assumpsit upon book account for goods sold and delivered, commenced by writ of attachment. The defendants pleaded in abatement that a suit for the same debt was brought by these plaintiffs against the defendants in the circuit court for Green county in this state, before this suit was commenced; and that the said former suit was, at the time of commencing this suit, and still is, pending in said circuit court. An affidavit of one Francis Emerson is annexed to the plea.

To this plea the plaintiffs demurred, and they set forth for causes of demurrer:

1. That the plea was not accompanied with a certificate of counsel that in his opinion the plea is well founded.

2. That the former suit is in a court of inferior jurisdiction, and the said plea does not aver that the said court had jurisdiction of the parties or the subject matter.

3. That the plea does not allege that the former suit was not discontinued before the plea in abatement was filed.

4. That a suit pending in a court of this state is not the subject of a plea in abatement in this court.

By the rule of court, demurrers or special pleas shall be accompanied with a certificate of the attorney or counsellor that, in his opinion, the demurrer or plea is well founded, otherwise the demurrer or plea may be treated as a nullity. The plea in this case was not so signed, but it has not been the practice to require a plea in abatement to be so signed. The affidavit required to the plea has been considered all that was necessary. When the objection was raised at the argument, the attorney for the defendant was allowed to annex the certificate. This was not a proper manner of making the objection; it should have been done by a motion to strike off the plea as a nullity.

The courts of the United States take judicial cognizance of the constitution and laws of the state on the subject of her courts, and we know that a circuit court for a county is a court of general jurisdiction.

The third point is, that the plea does not allege that the former suit was not discontinued before the plea in abatement was filed. The plea is in the usual form, that the former suit was, at the time of commencing this suit, and still is, pending. This is sufficient. We cannot look out of the record to see how the fact is in regard to the former suit. The plea states that the suit is still pending, which is conceded by the demurrer, and by this we are bound.

The objection that a suit pending in a court of the state is not the subject of a plea in abatement in this court is not tenable. By the 11th section of the act to establish the judicial courts of the United States¹ it is provided that the circuit courts shall have original cognisance concurrent with the

¹ 1 United States Statutes at Large, 78.

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courts of the several states of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars. It is too well settled by the courts of the United States to require citation of authority that in all cases when courts have concurrent jurisdiction, the court which first has possession of the subject must determine it conclusively, and has exclusive jurisdiction. In this case, there were two attachments of the defendant's property, and two writs served on them, and two suits pending against them at the same time. If such a proceeding were sanctioned, it would lead to great oppression, and would be a reproach to the administration of justice. A party has his choice of jurisdictions, but he cannot claim both at the same time. This court has always adhered to the rule not to entertain jurisdiction of a case when we are informed by a plea in abatement that a prior suit in law or equity for the same subject matter, between the same parties, is pending in a court of the state; and such, I have no doubt, is the rule in every court in the United States.¹ This court is not a foreign court to the courts of this state.²

The writ will be quashed.

This plea cannot be sustained unless the suits be of the same character, and the plaintiff be the same in both. *Logs of Mahogany*, 2 Sumner, 589; *Davis vs. Hunt*, 2 Bailey, 412.

Bancroft vs. Eastman, 2 Gilman, 259, was a case where two actions had been commenced by same plaintiff for same cause of action. *Held*, defendant, in second action, must aver pendency of first suit at time of filing his plea in abatement.

McConnell vs. Stettinius, Id., 707. A owed B, for which debt he gave his note in liquidation. B transfers to C, who sues on it, pending which B sues A on the original debt. *Held*, the first a good abatement to second suit if properly pleaded.

Branigan vs. Rose, 8 Gilman, 123. The ground of pleas in abatement (regarding two or more suits) is said to be the abhorrence of law to multi-

¹ *Earl vs. Raymond*, 4 McLean, 238.

² *Williams vs. Wilkes*, 14 Pennsylvania State, (3 Harris,) 238.

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plicity of suits; and that where a party has a *complete* remedy by an action commenced, another is abatable. But if the remedy of an action commenced is partial or ineffectual, another suit is proper; as where a proceeding *in rem* (foreign attachment) is pending, that is not cause for plea in abatement to second suit *in personam*.

Hart vs. Granger, 1 Connecticut, 154. In a petition in chancery by A and B against C, praying a contract for the purchase of Ohio lands to be delivered up and canceled as C had not broken it, C pleaded in abatement a bill in chancery brought by him and then pending in Ohio against A and B, praying damages for its breach or other equitable relief, *held*, good plea in abatement.

It was here contended that the plea of another suit was only applicable where the defendant had been harassed with two suits for the same cause, and not where defendant has first sued on the contract and afterwards plaintiff has also sued, but the court said, "But as a general principle, if the determination of the first suit commenced will determine the whole controversy, the first is pleadable in abatement of the last; at any rate it is so if the suits be not in the same court. I know not, indeed, that it would make any difference at law if they were both in the same court. It rather strikes me that in chancery, as the court could easily try them both together and settle at once all the controversies between the parties, the suits would stand on the ground of bill and cross-bill," and then goes on to say the first to sue should have the benefit of priority, &c.

In *Evans vs. Tingle*, 55 Illinois, 455, an appeal from a justice of the peace was dismissed; appellant filed a bill in chancery to re-instate the appeal pending which appellee sued appellant and his surety on the appeal bond.

They plead the chancery suit in abatement. *Held*, not good, there being no injunction to restrain the suit at law.

The pendency of a suit in a court of general jurisdiction in another state, in which property sufficient to satisfy the demand has been attached, is a good bar. *Mary J. Lawrence vs. Henry W. Remington*, April, 1874, to appear in subsequent volume to this Series.

The rule in some courts that the pendency of an action in a foreign jurisdiction is not pleadable in abatement, does not apply when the plaintiff has secured his debt by attachment in such action. *Ibid.*—[Reporter.

Fitzpatrick vs. Troy Insurance Co.

ALEXIS FITZPATRICK ET AL. VS. THE TROY INSURANCE COMPANY.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—OCTOBER, 1857.

IN EQUITY.

INSURANCE STOCK NOTES.—An insurance company has no right to divide its risks and capital into classes, and restrict the liability upon stock notes to the class in which they are placed. The insured has the right to call upon the whole capital of the company and require an assessment upon all the stock notes.

MILLER, J.—The plaintiffs recovered a judgment against the defendant upon a policy against fire on a store of goods. Upon the return of an execution unsatisfied, a creditor's bill was filed, with a rule for an injunction and for the appointment of a receiver. By the consent of the parties a receiver was appointed, who has filed his bond with sureties and has entered upon the discharge of the duties of his appointment. The receiver returned into court a schedule and inventory of the premium notes and assets of the company; and he has petitioned the court, setting forth that the company was organized with two departments, the farmers' department and the merchants', and that by the charter and by-laws the accounts and policies in each department were to be entirely separate and distinct from each other; and praying instructions as to the manner of making assessments upon the notes in each department for the liquidation of the debts of the company. Section 4 of Article 2 of the By-laws is, "that the accounts of each department shall be kept entirely separate and distinct, and no premium note shall be assessed for the payment of any loss except in the class to which it belongs;" and in pursuance of Article 9 of the charter, these by-laws are an-

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nexed to the policy and are made by reference a part of the contract in form.

These plaintiffs paid a cash premium without giving a note, and did not, therefore, insure on the mutual principle. They have a right to claim of the company the amount of their judgment. They have not, by a note or in any other manner, classed their policy under either department as specified in the by-laws.

The charter was granted and the company was organized under and by virtue of an act entitled "An act to provide for the incorporation of insurance companies," passed by the legislature of Wisconsin, and approved February 9, 1850. I do not find in that act any authority for the division of the company into two departments, or its business into classes. The fifth section requires agreements or notes for insurance before the organization of the company, which the corporators certified to under oath, upon submitting their application for the charter. That certificate does not classify the premium notes so received. These notes are required as capital of the company. They are "*payable when called for, according to the charter and by-laws of the company, to pay losses and expenses.*" But this provision does not authorize a classification of the notes. It is not contemplated by the act that there should be the classification as made by the charter and by-laws of this company. One charter, or the incorporation of one company upon each application, was intended. This charter and the by-laws virtually make two companies of separate and distinct interests and liabilities. The law of this state appears to be the same as that of the state of New York. The only decision in that state referred to is the case of *Thomas vs. Achilles*, 16 Barbour, 491, in which the court ruled that "a mutual insurance company, organized under the general insurance act, has no right to divide its risks into two classes according to the degree of hazard, and to assess the premium notes only for the payment of losses happening in the class to which such notes belong. The assured has a right to look to

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the entire capital of the company—that is, the whole amount of premium notes taken—for his indemnity, in case of loss, instead of being limited to the capital of that class of risks in which his policy has been placed. And in case an assessment is made, he has a right to claim that *all* the premium notes held by the company should be embraced therein.”

I adopt this decision as ruling the case and shall instruct the receiver accordingly.

Consult, also, 1 Phillips on Insurance, §510, and cases cited in note 8; *People's Eq. Mut. Fire Ins. Co. vs. Arthur*, 7 Gray, 267.—[Reporter.

SAMUEL F. PRATT ET AL. VS. JOHN C. BURR, MORGAN CRAIG, WILLIAM D. MEAD, ET AL.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—APRIL, 1858.

IN EQUITY.

1. PAYMENT TO ASSIGNEE—WHEN NO PROTECTION.—Where a bill was filed by the payees against the assignee and maker of a note to set aside the transfer and recover the note, the summons being duly served on the maker, the payment by him of a judgment in favor of the assignees rendered in another court on a suit subsequently commenced, does not discharge his liability to the payees.

2. To protect himself, he should have given the payees notice of the second suit and required them to defend it, or have paid the money into court on the first suit.

MILLER, J.—The bill in this case was filed on the 7th of August, 1856. A subpoena was issued and an injunction was allowed. William D. Mead acknowledges in his answer that he

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gave promissory notes to Burr & Craig, in part for the consideration of their store goods sold him. Two of these notes passed from Burr & Craig to R. H. Maynard, and to which he, Maynard, under the circumstances, did not acquire title in the usual course of commercial business, and he was not a *bona fide* holder as settled in this court. These complainants had an equitable lien on the notes or the money secured by them, in the hands of Mead, by virtue of this creditors' bill. The only question submitted is, "Is Mead relieved of liability to these complainants by reason of the judgment against him in Rock county circuit court, in favor of Maynard, on the note, and by his subsequent payment of that judgment?"

By inspection of the record, it appears that Maynard commenced suit on the note, against Mead, by serving a declaration on the 14th of January, 1857, with a rule to plead. Afterwards Mead filed a plea of the general issue with notice of the issuing and service of the injunction in this case; and that it was known to Maynard when he purchased or received the note of Burr & Craig. On the 2d of July, 1857, the parties appeared in court, by their counsel, and the cause came on to be tried before the court, the jury being waived; and the finding of the court and judgment were for the plaintiff for the amount of the note and interest. And on the 15th day of October, 1857, at Erie county, in the state of New York, the plaintiff executed a satisfaction piece of the judgment. It was stated at the argument that Mead's counsel several times spoke to complainants' counsel on the subject of that suit, and what was best to be done, and complainants' counsel concluded not to interfere in the suit. These complainants were not placed under any obligation to defend that suit either by a notice from Mead or by a bill of interpleader. They had no notice of the trial; nor are we informed by testimony what evidence was offered, admitted or rejected at the trial. If notice had been served on the complainants of the pendency of the suit, requiring them to appear and make defense, possibly they would be bound by

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that finding and judgment. In August last, that court decided that the two notes (of which the note in this suit is one) were transferred by Burr & Craig in fraud of these complainants and in contempt of this court, and that Maynard was not entitled to the money as a *bona fide* holder without notice. The first note was sued in this court, on which judgment was rendered against Mead, who paid the amount into court for distribution; the day after Maynard brought suit on the second note in the circuit court of Rock county. These plaintiffs were not parties to that suit in Rock county, and it is not in any way binding on them. So far as they have a lien on the money, and have a right to demand it in equity, they are not concluded. Judgments are only conclusive between parties and privies. At the trial of that case, these complainants had no notice nor opportunity to put in proof to show that Maynard was not a *bona fide* holder of the note. The trial was exclusively between Maynard and Mead. Maynard had a legal right to bring his suit against Mead in the state court, and to have it tried there; but Mead owed a duty to himself, before that trial and plea filed, to notify these complainants of the suit and to require them to make defense in his name and to furnish the evidence to defeat Maynard's recovery. Mead should have served the notice on these complainants or their attorneys and placed it on the files of that case, before filing plea. Nothing short of this can conclude these complainants. They were not bound to appear, nor could they appear or interfere with the suit without Mead's consent or requirement.

This suit in equity was pending against Mead a considerable time before the suit in Rock county. This suit prevented Mead from paying the amount of the note until it was ascertained whether it was negotiated and in the hands of a *bona fide* holder. The answer of Mead that he gave the notes but does not know whether they were negotiated or not, raised the question. If Mead had paid into this court the amount of the notes, Maynard might have appeared here and claimed this money, when his claim would have been disposed of by the court on

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evidence submitted, or upon an issue tried by a jury. Instead of doing that, Maynard took his suit out of this jurisdiction where the question was pending, into another jurisdiction where he and Mead had the matter tried in their own way without legal notice to these complainants.

This creditors' bill is an attachment in equity of the money in the hands of Mead owing by him on a negotiable promissory note. An attachment is unavailable against a *bona fide* holder for value, of negotiable paper, who obtains it after attachment, before maturity, and without notice.¹ The only question, as I remarked before, to be tried here was whether Maynard was a *bona fide* holder of the note.

In *Kennedy vs. Brent*, 6 Cranch, 187, the service of a subpoena in chancery, in a case of chancery attachment, will make the garnishee liable, if he pays the money after the notice of the subpoena. Such is the case in every attachment. An attachment in a state court, commenced after the institution of an action to recover a debt in a court of the United States, cannot be pleaded as a defense to the latter, either in whole or in part.² This decision is upon the reverse order to the state of the case here. The attachment here was the first. In the opinion in that case it is remarked, "The jurisdiction of the District court, * * * and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts, that would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion and the money recovered of the defendant before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question;" and if such could be pleaded in bar, "the same principle would support a plea in

¹ *Keffer vs. Ebler*, 6 Harris (Penn. Reports), 388, and cases cited.

² *Wallace vs. McConnell*, 13 Peters, 136, 151.

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abatement of an attachment pending prior to the commencement of the present suit. The attachment of the debt in such case in the hands of the defendant, would fix it there in favor of the attaching creditor, and the defendant could not afterward pay it over to the plaintiff. The attaching creditor would in such case acquire a lien upon the debt binding upon the defendant, which the courts of all other governments, if they recognize such proceedings at all, could not fail to regard. If this doctrine be well founded, the priority of suit will determine the right. The rule must be reciprocal; * * * the maxim *qui prior est tempore, potior est jure* must govern the case. This is the doctrine of this court in the case of *Renner & Bussard vs. Marshall*, 1 Wheaton, 216; and also in the case of *Beaston vs. The Farmers' Bank of Maryland*, 12 Peters, 102." In *Hacker vs. Stevens & Berryhill*, 4 McLean, 535, the money owing on a note was attached in the hands of the debtor. The note was indorsed or assigned and the assignee brought suit against the maker, who pleaded in abatement the attachment, which plea was sustained, although the two suits were not in the name of the same parties. In that case the note was transferred to one of the firm to whom the note was payable. In this case the note was transferred to a brother-in-law of one of the payees, under very suspicious circumstances. There is no doubt but Raymond knew of the pendency of this suit in this court before he commenced his suit in the state court. He should have come here and through Mead, as a defendant, have had his right to the money tried. From the situation of that case in the state court as placed by Raymond and Mead by their pleadings, the court might have continued the trial if asked by Mead until a reasonable time for the trial of this case. This court would in the exercise of its discretion have done so, under like circumstances, but there is nothing on the record showing that such application was made, or that a plea in abatement was filed.

The satisfaction piece attached to the record of the judgment in Rock county is no evidence of payment except as be-

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tween the parties to the judgment. It satisfies the judgment, but it is not evidence affecting these complainants of the absolute, *bona fide* payment of money. It is nothing more than a mere declaration of a party not under oath, as to the rights of these complainants.¹ But from the view taken of this case it makes no difference whether the judgment has been satisfied or not. Mead should have taken some of the means here pointed out to prevent the judgment being rendered against him in the Circuit Court of Rock county.

The proof clearly showing that Maynard was not a *bona fide* holder of the note, and that the title still remains in Burr & Craig, reference will be made to a master to ascertain the amount due.

¹ *Loyd vs. Lynch*, 4 Casey, 419, and cases cited.

Day vs. Emerson.

CALVIN DAY ET AL. VS. FRANCIS EMERSON ET AL.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—AUGUST TERM,
1858.

MONEY IN MARSHAL'S HANDS.—Where the marshal has money in his hands, the balance of proceeds of sale of property claimed by a party other than the execution debtor, and to recover which such party has brought suit against him, the court will not order him to pay the money into court pending such suit, there being no proof of collusion or danger of loss.

MILLER, J.—In this bill, Charles Windt is made a party defendant. He is alleged to have money in his hands which should be applied as the funds of the judgment debtors, Francis Emerson and Charles F. Foster, to the payment of these complainants' debts and set out in this judgment creditors' bill. Windt filed his answer, in which he states that, as deputy marshal, he levied on goods by virtue of an execution against these defendants, which were claimed by Simon P. Candee, and he sold the same under said execution; and after paying off that execution out of the proceeds of sale, there remained in his hands a surplus of \$538. He also states that Candee brought suit against him for taking said goods, which suit is still pending. And he prays that he may be permitted to retain the money until the final determination of the suit. The complainants have moved, verbally, for an order that Windt deposit that money in court to await the final disposition of the suit. There is no allegation that the funds are not safe in Windt's hands, supported by affidavit, nor is it alleged that notice of this motion was served on him. Primarily, he should be entitled to retain it, as in the event of that suit being determined against him, he would be obliged to pay back to Candee this money. Candee would in that event have the

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first and paramount right to the money, with interest. If this court were to order the money deposited here, Windt would be deprived of making interest out of it during the pendency of that suit. We have no evidence of collusion between Candee and Windt in regard of that suit, or that it is delayed for Windt's benefit in retaining the money in his hands; nor that Windt is not responsible for it on a final decree in this court against him.

The application cannot be considered in its present shape.

THOMAS C. DOREMUS vs. WILLIAM A. BURTON.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—JANUARY TERM,
1860.

NOTE FALLING DUE ON SUNDAY.—Where a note, drawn without grace, falls due on Sunday, demand and protest on Saturday is good to hold the indorsers.

MILLER, J.—At the trial of this cause, which is a suit against the defendant as indorser of several promissory notes, it was objected that one of the notes became payable on Sunday, and that it was protested on Saturday previous for non-payment. These notes were negotiable, without days of grace. The court advised the jury to include this note in their calculation of the damages, and on a motion for a new trial, the question could be considered, and if the assessment was found not to be legal, the plaintiff might remit the amount, or a new trial would be ordered. On the motion for that purpose, I have examined the subject.

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The law is universal in this country and in England that where the last day of grace falls on Sunday, demand and notice must be made on the Saturday previous. Such is the law of the Supreme Court of the United States.¹

In Chitty on Bills, 377, it is stated that, "In this country [England], at common law, if the day on which a bill would otherwise be due falls on Sunday, or a great holiday, as Christmas-day, the bill falls due on the day before; and where a third day of grace falls on a Sunday, the bill must be presented on Saturday, the second day of grace; whereas, otherwise, a presentment on a second day of grace, being premature, would be a nullity." The reason of the rule as to notes in which days of grace are allowable is that as the allowance of days of grace is a mere indulgence to the maker, it shall be granted only in cases where it will not work any extra delay to the holder of the note, who is entitled to strict payment. If any other rule were adopted, he would be compelled to lose the use of his money for four days. But in practice, and in fact, according to the law of this state, a note for thirty days, where days of grace are not waived, as in this note, is a note for thirty-three days,—so understood when the note is given and received, such is the contract. Now the question is, Does the waiver of the days of grace extend to the maker one additional day when the day of payment falls on Sunday? At the trial I was inclined to place the note in this respect as a non-negotiable contract, which it was understood would not be payable until the Monday following. In a note to §220, Story on Promissory Notes, the above remark of Chitty is copied. This seems to confirm the principle that, at common law, this note would be payable on Saturday. In the case of *Banker vs. Parker*, 6 Pickering, 80, it is stated by the court that the note in suit fell due on Sunday, and having been made in 1824, was not entitled to grace, the statute allowing grace on

¹ *Loudinberger vs. Brall*, 6 Wheaton's Reports, 104.

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promissory notes not having been passed until 1825. The note became due, therefore, on the 13th of November, 1825, and should have been demanded on the 12th, as the day of payment, according to the note, was Sunday. Reference is made to *Jones vs. Falls*, 4 Massachusetts, 245. Such seems to have been the common law of Massachusetts. In the case of *Avery vs. Stewart*, 2 Connecticut, 69, the note sued on was for a certain sum in cotton yarn and was not negotiable. It fell due on Sunday, and a tender of the yarn was made on the Monday following. The court, six judges to three, decided that the tender on Monday was good and in time. The Supreme Court of New York, in the case of *Salter vs. Burt*, 20 Wendell, 205, decided that the check in suit having been protested, which was payable on the day of its date, which was Sunday, could not be demanded until the Monday following. It is apparent that it could not be presented at the bank for payment on Saturday, as it did not bear date on that day, but on the day following. It did not purport to have been written on Saturday. The reason given by the court favors the idea that this note was payable on Monday; but although the decision was correct, the reasoning may possibly be wrong. It is very certain that a presentment of the check on Saturday would be premature.

The note in suit being a negotiable note, with grace waived, is to be considered the same in regard to Sunday being the day of payment as if the waiver had not been made. When the note was made the maker may possibly have known that the day of payment would fall on a day on which it would be illegal to make demand. At all events, the instrument is to be considered against the maker, and upon such principles is not to be so construed as to allow an indorser to escape.

The motion for a new trial will be overruled and judgment entered on the verdict.

Where goods sold were to be delivered on a certain day by the agreement of the parties, and that day was Sunday, it was held that they should have been delivered on Saturday. *Kilgore vs. Miles*, 6 Gill and Johnson, (Md.), 268.—[Reporter.

Snyder vs. Brachen,

JOHN SNYDER, EXECUTOR OF DAVID SNYDER, DECEASED,
vs. JOHN BRACHEN AND ARCHIBALD STETT.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—JANUARY TERM,
1860.

RELEASE—PLEADING.—A release of a judgment, which has been subsequently revived by *scire facias*, cannot be pleaded in an action brought on the revived judgment.

MILLER, J.—The summons was served on John Brachen. The suit is upon a record of a judgment rendered in the Court of Common Pleas of Huntingdon County, Pennsylvania, by the plaintiff's testator against these defendants and one William Simpson who has since died. The defendants pleaded *nul tiel record*, and a release in writing by plaintiff's testator of Archibald Stett, dated September 24, 1850, of his liability on the judgment for the consideration of \$120, in which is an express stipulation that it shall not release or discharge Brachen and Simpson of their part of the debt. This was originally a partnership debt of the several defendants.

It appears from the record that the judgment was originally entered against the three defendants for \$213, with interest, on the 11th of March, 1835. A *fi. fa.* was issued and personally served, property sold, and the proceeds of sale were applied to previous executions. The judgment was revived on the return of *nihil* August, 15, 1842. *Alias scire facias* to revive judgment was issued to the November term, 1857. *Nihil* returned. November 26, 1857, affidavit of defense filed, and defendants plead *nul tiel record* and payment, with leave to plead specially. July 16, 1858, a jury rendered a verdict for the plaintiffs of \$478.51, and judgment was entered upon the verdict on the 21st of July, 1859.

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Upon inspection of the transcript I am satisfied that there is such a record.

The plaintiffs demurred to the plea of release. The release as set out was no doubt given to Stett. But there has been a revival of the judgment against the defendants by verdict, upon the plea of payment interposed, which would have entitled the release to be read in evidence, and a judgment since the date of the release.

This court is to give to judgments the same force and effect as given to them in the state where they were rendered. Now here is a judgment rendered by the court after the date of the release pleaded. This is conclusive upon this court, and the demurrer to the plea must be sustained. It is a rule that after a judgment or revival, we cannot go behind that judgment to admit evidence affecting the judgment. Nor on a *scire facias* to revive a judgment can evidence be admitted affecting the merits of the original judgment, as that would have been a defense to the demand upon which the judgment was rendered.

Demurrer sustained.

See also *Cardesa vs. Humes*, 5 Sergeant & Rawle, 65; *Share vs. Becker*, 8 Sergeant & Rawle, 239; *Wilson vs. The Executors of Charles Hurst*, 1 Peters, C. C., 441.—[Reporter.]

Brest *vs.* Smith.

FRIEND BREST *vs.* JOHN N. SMITH.CIRCUIT COURT.—DISTRICT OF WISCONSIN.—APRIL TERM,
1860.

1. DISCHARGE UNDER INSOLVENT LAW.—A New York judgment creditor, who has re-sued his judgment in the State Court of Wisconsin, but also joined in insolvency proceedings in New York, cannot maintain a suit in the Federal Court on his Wisconsin judgment.

2. The discharge bars the New York judgment, and the other is dependent upon it.

MILLER, J.—This suit is upon a judgment record from the Circuit Court of Rock County in this state. That suit was upon a judgment record from the state of New York. The defendant pleads a discharge from his debts by an order of the county court in the state of New York on the petition of a majority of his creditors, in which the plaintiff, residing there and being a citizen of the state, joined. The petitioner, Smith, returned the judgment in the state of New York, making no mention of the judgment in Rock county in this state. This plaintiff is bound by the order of discharge, he being a citizen of that state, and, joining in the petition as a creditor, cannot controvert here the order of discharge.¹ By the Constitution of the United States and the act of Congress, full faith is to be given to judgments of courts of the states, and they are to be considered the same in the state where they are sued upon as in the state wherein they were originally rendered. It was not necessary for the petitioner to return the judgment in Wisconsin. The judgment in Wisconsin was

¹ *Clay vs. Smith*, 3 Peters, 411.

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dependent on the judgment in New York, and whenever the judgment in that state is satisfied, it is the duty of the court in this state, on proof of such satisfaction, to order the judgment here to be satisfied also. The defendant, Smith, might have procured satisfaction of the judgment to be entered of record in New York, by sending a certified copy of his discharge from his debts to the court wherein the judgment is recorded, and then by showing to the court in Rock county the evidence of such satisfaction by certificate from the New York court, a similar order should be made.

We will not inquire into the proceedings of the County Court of New York, collaterally, as a court of review.

Being satisfied that the plaintiff cannot recover, and willing to leave the case in Rock county, an order will be made sustaining the plea.

The Juneau Bank vs. McSpedan.

THE JUNEAU BANK vs. THOMAS McSPEDAN.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—APRIL TERM, 1860.

1. SERVING PARTY TO SUIT.—A non-resident defendant, coming within a state for the purpose of defending his suit, cannot be legally served with process in another suit, even though the prior suit be first discontinued.

2. STRIKING OUT SERVICE.—The court will order the service so made to be stricken out.

MILLER, J.—The defendant, a citizen of the state of New York, was sued by the plaintiff, a corporation of this state, in assumpsit. The summons was personally served. He appeared by attorney and moved the court to quash the writ. The affidavit of defendant contains the grounds for the motion, on which it was submitted by the counsel. It sets forth that an action was commenced against him as a non-resident of the state by the plaintiff for the same cause of action as in this cause, in the County Court of Milwaukee County, and his property in the state was attached; that he appeared to said action and answered; the cause was noticed for trial; that he was advised by his counsel that his presence was necessary at the trial, and that he came to Milwaukee for the purpose; and while here, waiting for the trial of the cause, it was discontinued, and the same day this summons in this case was served on him in Milwaukee.

In England, the privilege from arrest has always been construed to include the service of a summons. So in this country from a very early period. The privilege asserted here is the privilege of the court—that is, of the County Court of Milwaukee County, rather than of the defendants; and it is liberally construed, for the due administration of justice. It is founded on the necessities of the judicial administration, which

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would often be embarrassed—probably sometimes interrupted—if the suitor, while attending court for the protection of his rights, or a witness while attending, either with or without the service of a subpoena, should be troubled with process. If such were allowed, suitors and witnesses might be deterred from attending court, whereby injustice may be done. A suitor or witness from another state or jurisdiction should be relieved from the service of process upon them. By the act of Congress, a party defendant must reside in the district or be found in it. But it would not do to construe those words so as to prejudice the administration of justice in other tribunals. If this defendant had been actually arrested before he returned from the state, the county court could have discharged him; and upon the same principle, this court should strike off the return of service.¹ This last decision was approved by Chief Justice Taney and Justice Grier. Attorneys are also relieved from the service of a summons while attending court.² It is not necessary to refer to any more authorities, for the court could not sanction the service of a summons or *mesne* process upon a non-resident who came into the state for the purpose of prosecuting or defending a cause of his own in a court of this state.

The summons was legal, and it cannot be disturbed, but the service will be stricken off.

¹ *United States vs. Edme*, 9 Sergeant & Rawle, 149; *Stuart's Case*, 1 Dallas, 356; *Halsey vs. Stewart*, 4 New Jersey (1 Southard), 366; *Parker vs. Hotchkiss*, 1 Wallace, J., Reports, 269.

² *Gilbert vs. Vanderpool*, 15 Johnson, 242.

Perego vs. Bonesteel.

JOHN W. PEREGO ET AL. VS. JOHN N. BONESTEEL,
HENRY E. BONESTEEL AND JOSEPH CARY.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—AUGUST TERM,
1860.

IN EQUITY.

CREDITORS' BILL—CONFLICTING CLAIMS.—After the appointment of a receiver under a creditors' bill another creditor can acquire no rights by levying an attachment upon property of the judgment debtor. Where the court has obtained jurisdiction under a creditors' bill it will protect the creditor in following up his rights.

MILLER, J.—This bill was filed Oct. 11, 1859. The subpoena, with notice of a rule for an injunction, and for the appointment of a receiver, was served on all the defendants on the 12th of October. An injunction against the two first-named defendants was allowed on the 15th of October and was served on the 22d. November 15th an injunction was allowed against Cary, and an order was made and issued for the appointment of a receiver. A receiver was appointed November 21st, who on that day gave his bond. November 23d the bill was amended by making A. J. Langworthy a party defendant. November 25th the answer of Langworthy was filed. In this answer he sets forth that a writ of attachment at the suit of the Farmers' and Millers' Bank against John W. Bonesteel, was placed in his hands on the 15th of November, 1859, which he served by seizing goods as the property of Bonesteel, in the hands of Cary. He does not state the day he seized the goods, but I presume it was the day the writ came to his hands.

The bill is a common judgment creditors' bill upon the re-

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turn of *nulla bona*, and also a charge that Bonesteel had made a fraudulent assignment to Cary, which is prayed to be declared null and void.

In *Eager vs. Price*, 2 Paige, 333, 338, a supplemental bill was filed for the purpose of securing a lien on bank stock that came to defendant after filing the original bill, which was sustained. The stock might have been sold under execution. The court say, "the creditors by the bill acquired a specific lien on the property." There is no doubt but the filing of the bill and service of a subpoena gives an equitable lien on property that cannot be seized on execution. In *Lansing vs. Eaton*, 7 Paige, 364, the court say: "The ordinary injunction upon a creditors' bill, *which only operates upon the defendant*, will not, of course, prevent another judgment creditor from levying upon property of the defendant which is the proper subject of a levy, and sale on execution, before the title of the defendant in such property is equitably divested by an order for a sequestration thereof or *for the appointment of a receiver*." This is an opinion as to the effect of the injunction. In the case of the bill before me, the order for the appointment of a receiver divested the defendant of all interest in the goods liable to execution. By the bill, the complainant acquired an equitable lien thereon, yet, according to the case of *Lansing vs. Eaton*, before such order, that lien might not be protected against the legal right obtained to it by another creditor who levied upon it by an execution at law or an attachment. In *Storm vs. Badger*, 8 Paige, 130, the bill was in the usual form of a creditors' bill as to the judgment debtors, and the other defendants were made parties to reach property in their hands belonging to the judgment debtors. And it was alleged that the defendant had property that might have been levied on. The chancellor says: "The object of this suit in this court is to aid the execution at law, and not as a mere substitute of an equitable instead of a legal remedy." The chancellor, in *Cuyler vs. Moreland*, 6 Paige, 273, decides that where the right to file a creditors' bill once exists, by the return of an execution

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unsatisfied, if the defendant has property which is the subject of sale on execution, but which has been fraudulently assigned, and has other property which can only be reached by a bill, the plaintiff may take out a second execution and levy on property. It is understood, that an order for the appointment of a receiver is equivalent to actual levy. In the matter of *Allen vs. Bankrupt*, 5 Law Reporter, 362, Judge Conkling, in reference to the New York authorities, says that the lien is not created by the filing of the bill alone, but the service of the subpoena is also necessary. He also remarks: "The only case I have met with which seems to militate at all against this doctrine, is that of *Lindsey vs. Easton*, 7 Paige, 364. In that case, it is said that a judgment creditor may levy on the property of the defendant, which is the proper subject of levy and sale on execution, before the title of the defendant in such property is divested by an order for the sequestration thereof, or for the appointment of a receiver. This is a rule of the Court of Chancery of New York. But there is nothing in this case, properly understood, which conflicts with the other cases. The particular or more appropriate design of the creditors' bill is to enable the creditor to appropriate such property of the debtor as is not liable to seizure by *fi. fa.*, and, as the practice is to require the debtor to assign to the receiver all his property, whether subject to execution or not, it was probably thought but just to other creditors to take care that no unnecessary impediment should be thrown in the way of their ordinary legal remedy;" and it is there decided that the creditors' bill holds the property in preference to proceedings in bankruptcy commenced after the filing of the bill and service of the subpoena. In *Storm vs. Waddell*, 2 Sanford's Chancery Reports, 494, it is decided that if a judgment creditor files his bill and duly prosecutes his suit, he thereby acquires a lien which cannot be impaired by subsequent proceedings in bankruptcy, although no receiver was appointed until after the debtor was declared a bankrupt. It will be observed that on the same day that

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Langworthy, the sheriff, received and served the writ of attachment by attaching goods in the hands of Cary, an order was made in this court for an injunction against Cary, and also of reference for the appointment of a receiver. These complainants were proceeding to have the property of the defendants in the hands of Cary, who was holding under Bonesteel, appropriated by law to the payment of their debt, which could not be done until the assignment under which Cary held the property should be vacated, which was the object of the bill. The court had taken cognizance of the case before the attachment was placed in Langworthy's hands. In the case of *Wiswall vs. Sampson*, 14 Howard, 52, the receiver was appointed by a decree of the court, but it does not appear that he gave bond for the faithful discharge of his duties. He was considered in possession of the property. And in *Booth vs. Clark*, 17 Howard, 322, a receiver is stated to be an officer of the court, having full power to attend to this business within the jurisdiction without an assignment from the debtor, but not to maintain a suit outside the jurisdiction without such assignment. By the appointment of a receiver the property is in the custody of the court,—the court having acquired jurisdiction of the case by the filing of the bill and the service of process. The great object of this bill was to set aside a fraudulent assignment, and the court had acquired full jurisdiction of it and had awarded an injunction against Bonesteel, the debtor, which was served a month before the sheriff's attachment.

I am of the opinion that this bill has the preference over the sheriff's attachment.

SAME vs. SAME.

OCTOBER TERM, 1860.

1. GARNISHMENT.—In Wisconsin an assignee under a fraudulent assignment may be made a garnishee in attachment proceedings, and it is immaterial how the property came into his hands, so it be property liable to seizure by attachment.

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2. PRACTICE—GARNISHEE.—If the garnishee afterwards turns over property to a receiver appointed under a creditors' bill filed by another creditor, the court will protect him by ordering the proceeds of such property paid to the creditors to whom he was first liable as garnishee.

It appears that an attachment was issued out of this court against John and Henry Bonesteel at the suit of Henry C. Bowen and others, and on the 16th of June, 1859, Joseph Cary was summoned as garnishee; and a writ of attachment was issued out of this court against the same defendants, at the suit of Horace B. Claflin and others, whereupon Joseph Cary was summoned as garnishee on the 20th of July, 1859. By his answer, he held the property of the defendants by virtue of an assignment from them to him for the payment of debts; and that he then had in his hands about three thousand one hundred dollars in money and about ten thousand dollars in goods.

After the decision of this court that the attachment in the case of Alexander Stewart and others against Bonesteel was well founded, for fraud in the assignment, Cary, the garnishee, paid over the funds in his hands to the plaintiffs in that and other attachments, and also in part payment of the debt of Henry C. Bowen and others.

These two attachments and those preceding, in order of time, were issued and proceeded in for the same cause and in the same manner. Cary was summoned as garnishee and was permitted by the plaintiffs to remain in possession of the property until he surrendered it after the decision in the case of Stewart and others. He was as much liable for the property that came to the hands of the receiver as he was for the property and money he paid on the attachments, as it was all in his possession when these two attachments were served. The possession of the receiver was substituted for that of the garnishee Cary. Cary gave up all charge of the remaining property, and the sheriff attached it on the 15th of November. If Cary was legally chargeable as garnishee, the sheriff's attachment would not release him, and he would be

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chargeable with the value of the goods that came to the receiver's hands on these two attachments of Bowen and others, and Clafin and others. If he was legally chargeable, as garnishee, with the goods that passed into the receiver's hands, he could only divest himself of the liability by the consent of these attaching creditors.

It is contended that Cary could not be made chargeable by the attachments, as he held the property of the defendants under an assignment, and that upon the proceeding by garnishee process under the attachments, the validity of the assignment could not be inquired into; that it was the duty of the plaintiffs in the attachments to require the officer to treat the assignment as a nullity and to take the property into custody. It is true that the plaintiffs might have done so after indemnifying the marshal, but the question is, were they bound to do so?

In these cases, affidavits were made according to section 34 of the attachment laws, that Joseph Cary had in his hands property of the defendants, and in pursuance thereof he was summoned. By section 35 of the law, from the day of such service, he stood liable to the plaintiffs in the attachments for the amount of the property and moneys, credits and effects in his hands; and he shall answer under oath all questions put to him touching the property, credits and effects in his possession or within his knowledge. If the garnishee fails to appear and answer, he may be attached and judgment may be rendered against him for the amount of the plaintiff's debt. If it appear from the answer of the garnishee that he was indebted to the defendants, or that he had property in his hands belonging to the defendants at the time he was notified, he shall forthwith deliver such property or pay the amount of his indebtedness to the officer; and in case of his not delivering over the property or paying his indebtedness, the court may enter judgment against him. And if it appear from the answer of the garnishee that he holds the title of any real estate, or any interest therein, in trust for the defendant,

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or for his benefit, he shall convey the same to the officer, who shall, under the direction of the court, proceed to sell the same in the same manner as a receiver. In case the plaintiff is not satisfied with the answer of the garnishee, the plaintiff may have a trial on the issue formed by such answer. Now, I think from the whole scope of the law, an assignee under a fraudulent assignment may be made a garnishee in attachment. If he confesses in his answer the fraud, or if it is found by a jury, he is in law a trustee of the property in his hands. Under the laws it is immaterial how the property came into his hands, if it is property that is liable to seizure by attachment. When the assignee is satisfied that the assignment is voidable by creditors, he may turn over the property, and he may even convey real estate, to the officer. In the case of *Edwin Mead vs. Nelson H. Purdy*, this court has carried out this provision of the law, and proceeded in the sale, and the deed, and in ordering a writ of assistance, the same as if it were a case in equity. It is a law of the state regulating titles, and may be followed in this court.

The attachment law provides for a trial of the issue raised by the answer of the garnishee, and there is no more common issue than the one raised by Joseph Cary in his answer. Such has been the practice of this court, and, I presume, of the courts of the state under the law. The attaching creditors were not bound to have the goods seized in Cary's hands in the first instance, but they may proceed against him as garnishee to test his title, and if successful, to charge him with their value. The attachment, in the first instance, being necessary to prevent the garnishee from disposing of the property, it is proper for the court to proceed in the case to a final determination.

Upon the answer of Joseph Cary, and the proofs submitted, there is no doubt the attachments were issued on legal grounds, and that the alleged fraud is fully established.

Cary was made chargeable to these plaintiffs with the value of the property that passed into the hands of the receiver.

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If judgments were rendered against Cary for the amount of said property, he would have a right to have the amount realized out of the property by the receiver appropriated to those attachments, he not having possession of the property fraudulently. Upon this consideration, the money paid into court by the receiver will be ordered paid on the two judgments of Bowen and others and Clafin and others; and if there should be a surplus, it will be paid to these complainants.

LEWIS TAPPAN ET AL. VS. A. HYATT SMITH ET AL.

CIRCUIT COURT.—DISTRICT OF WISCONSIN.—JULY TERM,
1863.

IN EQUITY.

ASSIGNMENT OF INTEREST BY COMPLAINANT—PRACTICE.—Where a complainant has assigned his interest in the subject-matter of the litigation pending the suit, his assignee cannot on a supplemental bill be substituted to his rights. He must file an original bill in the nature of a supplemental bill.

MILLER, J.—The complainants bring this bill by way of supplement and revivor, against A. Hyatt Smith and others.

The bill shows that on or about the 19th day of June, 1858, the complainants, Henry C. Bowen, McNamee, Holmes, and Stone, exhibited their original bill against the same defendants, thereby stating such several matters and things as are therein for that purpose more particularly mentioned and set forth, and praying, etc., (giving the several prayers of said original bill); that process had issued against said defendants which was duly served; that testimony has been taken in said cause, and the same is ready for hearing; that on or about the 7th of December, 1861, the said complainants in said

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original bill made a general assignment to the said Lewis Tappan for the benefit of their creditors, and that the judgment or claim upon which said bill is filed is a part of the choses in action, or assets so assigned; and the said Lewis Tappan thereby and for the purpose of said assignment has become interested in the subject of said suit. And the bill further represents that said suit and proceedings have become defective by reason of said assignment; and complainants are advised that said Lewis Tappan as such assignee is entitled to be made a party complainant in said suit, and to have the said suit and proceedings revived against the said defendants, and to have the same benefit of the proceedings in said suit as if the same had been instituted by him as assignee as aforesaid, concluding with a prayer for this purpose, and for a subpoena etc.

To this bill the defendants filed a demurrer, showing for cause of demurrer that the original complainants, having voluntarily assigned their interest in the judgment mentioned in their bill, the complainants, Lewis Tappan and others, cannot revive and continue said suit commenced by the original bill, by supplemental bill or bill of revivor or both, but must file an original bill in the nature of a supplemental bill on notice and leave of court.

This bill was filed under equity rule 57: "Whenever any suit in equity shall become defective, from any event happening after the filing of the bill (as, for example, by a change of interest in the parties) or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill the defendant shall demur, plead or answer thereto" etc.

This rule does not specify the kind of bill to be filed in any given case, whereby the suit may become defective. The intention of the rule is to allow a judge on any rule day to grant

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leave to file the bill; and then to direct the manner of pleading to it. It leaves the kind of bill to be filed to be prepared by the pleader according to the circumstances of the case; and requires the defendant to demur, plead or answer thereto.

By Rule 90, "In all cases where the rules prescribed by this court, or by the circuit court, do not apply, the practice of the circuit court should be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied, consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

The only case I can find in the reports of the Supreme Court of the United States, bearing on this subject, is *Greenleaf vs. Queen*, 1 Peters, 138. The trustee in a deed of trust for the sale of real estate and payment of debts of the grantor was a party defendant. During the pendency of the suit the trustee died, and a new trustee was appointed by the court. The court hold that the original suit, which abated by the death of the trustee, became also defective by the termination of his powers and the appointment of a new trustee, and could only be prosecuted against him by way of a supplemental bill, in the nature of a bill of revivor. This decision is in conformity with the Chancery Practice in England. The reason is that by the death of the party suing or sued in *autre droit*, there is no change of interest, upon the appointment of a successor, and the suit may be revived by supplemental bill.¹

Where a sole plaintiff, suing in his own right, assigns his whole interest to another, the plaintiff being no longer able to prosecute for want of interest, and his assignee claiming by a title which may be litigated, the benefit of the proceedings cannot be obtained by a supplemental bill, but must be brought by an original bill in the nature of a supplemental bill.² In 2

¹ Mitford's Equity Pleadings, 64 (Lord Redesdale).

² Mitford's Equity Pleadings, 65.

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Daniells' Chancery Pleading and Practice, 1518, the same position is quoted from Lord Redesdale, and the reason for the distinction between a supplemental bill and a bill in the nature of a supplemental bill is there given. In the first case the original suit may proceed after the supplemental bill has been filed, in the same manner as if the original plaintiff had continued such, except that the defendant must answer the supplemental bill, and either admit or put in issue the title of the new plaintiff; but in the case of an original bill in the nature of a supplemental bill, the whole case is open.

The same principle is copied by Judge Story in his Equity Pleadings, §§348, 349.

I have carefully examined all the cases referred to at the argument; and although there are rulings by vice-chancellors and chancellors that might cast some doubt on the propriety of this rule, and induce the court to disregard it under the belief that, in the case here presented, the requirement of a bill in the nature of a supplemental bill is more technical than wise, and is unnecessarily burdensome to parties, yet this court, being subordinate to the Supreme Court of the United States, is obliged to follow the rules adopted by them. That court follows with great particularity the rules of practice as given by Daniell in his volumes of practice. The bill sets forth an absolute assignment of the judgment by the sole plaintiffs suing in their own right to Tappan, as assets for the payment of debts, and that thereby the title is vested in the assignee.

I feel obliged by the rules to sustain the demurrer and to dismiss the bill. It should have been an original bill in the nature of a supplemental bill.

As to the character of an original in the nature of a supplemental bill, and when properly brought, consult Barbour's Chancery Practice, 2 volume, p. 84, and note 1; and *Butler vs. Cunningham*, 1 Barbour, 85.—[*Reporter*.

JOHN HAMILTON vs. SIMONS & SAMPLE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY,
1869.

IN EQUITY.

1. AVOIDING INJUNCTION.—Where an injunction has been issued restraining a defendant from using patented parts of a machine, he is not at liberty to leave off certain parts selected by himself as infringements, and continue the use of the remainder of the machine; the proper course is for him to take the judgment of the court in the matter.

2. ADVICE OF COUNSEL.—Is not a sufficient justification, and counsel should not take such a responsibility.

R. H. Forrester, for plaintiff.

Hitchcock, Dupee & Evarts, for defendants.

DRUMMOND, J.—I do not consider it necessary, in this case, to go into the history or details of the question argued on the motion.

An application was made to the court for an attachment against the defendants on the ground that they had violated the injunction issued by the court, and the defendants, admitting that they had sold the apparatus which was claimed by the plaintiff, contend that since the issuing of the injunction they had left off all the material parts covered by the Carpenter patent.

Whatever may be true in relation to the patent of May 25, 1858, still there is a question connected with the patent of August 4, 1857, upon which it was claimed the patent of 1858 was an improvement, and which is not affected by these changes which have been made in the apparatus of the defendants since the issuing of the injunction. It is a very ma-

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terial question, and of such a character that the court cannot say but that the defendants may have violated the injunction, because if we concede that they have left off what was claimed in the patent of 1858, since the issuing of the injunction, there is another question behind. I will only concede it for the purpose of argument. It is clear to me that the defendants had no right under the circumstances of the case to take the responsibility of disobeying the injunction simply because they left off certain improvements covered by the patent of 1858. The true course for them was either to come into court and ask for a dissolution of the injunction, or to ask for security from the plaintiff if it is a doubtful case. It is a very serious responsibility, where an injunction is issued against a party, restraining him from using any parts of a machine covered by a patent, to leave off certain parts and then take for granted that he is not infringing the patent, and is not violating the injunction. This was done by the defendants under the advice of counsel, but it was advice which I think counsel had no right to give. It is the duty of the counsel to ask for the judgment of the court in such a case, and not take the responsibility of telling his client that he can go on and disregard the injunction.

It seems to be a clear case, where the defendants had no right, in the absence of any action on the part of the court, to go on and dispose of this machine in the way they have done.

Unless it is insisted by the counsel for the plaintiff, I shall not feel inclined to punish these men unless they continue violating the injunction, but the order of the court will be that the motion interposed by the defendants to discharge them from the attachment will be overruled. I shall not discharge them. I shall simply decline, under the circumstances, to punish them at present.

In re Moore.

In re RUFUS E. MOORE AND JAMES T. KELLY.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY,
1869.

IN BANKRUPTCY.

1. PETITION BY PART OF A FIRM.—One or more partners may file their petition in bankruptcy without making the others parties, but notice of the pendency of the proceedings must be given to the other partners.

2. The petition must pray that the firm be declared bankrupt.

Case submitted by Lincoln Clark, Register.

“On the 29th day of December, 1868, Rufus E Moore and James T. Kelly filed their petition in this court, praying for the benefit of the act of March 2d, 1867. A certified copy of their petition and schedules have been sent down to me as Register, and also an order of the court to proceed in the matter. The petition sets forth that the petitioners were co-partners with one Mrs. Hatch. It states that the members of said co-partnership owe debts, etc., and are unable to pay all their debts in full; that they are willing to surrender, etc., in the usual form. The petitioners then pray that this petition may be taken as the separate and individual petition of each of them respectively, if in the judgment of the court they are not entitled to make application for their discharge under the bankrupt act jointly.

“What kind of application is this? Is it an application to have the firm declared bankrupt, or is it to have the petitioners declared bankrupt?

“My understanding is that the firm cannot be declared bankrupt unless all the members of it join in the application, or unless the petition is so framed as to give the outstanding party an opportunity to deny the fact of bankruptcy. In the

In re Moore.

present case the petition is in form neither the one nor the other.¹ In view of this rule it may be well to ask, how can a third party be said to refuse to join when, as yet, it may be that he has no knowledge of the proceeding? And is it competent to give a notice of the proceeding when it is not shaped for that purpose; in other words, where the petitioners do not ask to have the firm declared bankrupt?² The debts of the firm are very considerable. So far as the schedule shows, there are no firm assets, except what may be found in a deed of assignment made by the co-partners in May, 1868. Should the property named in that assignment come to the hands of the assignee in bankruptcy, there would be assets.

"But I cannot regard this as a proceeding to have the firm declared bankrupt. If it were such, the outstanding partner might be able to show that it was not bankrupt. I think the petition might be so amended as to make it an application to have the firm declared bankrupt, but I cannot see how a third party can be brought in for that purpose when the petition is not properly framed to that end. If it is not a proceeding to have the firm declared bankrupt, can it be declared competent to have the petitioners individually so adjudged? I cannot see how it can be so regarded. Individuals can join only on the fact of joint interest and according to form prescribed. In other cases the proceeding should be individual.

"I am of opinion that the petition should be so amended as to make it a proceeding to have the firm declared bankrupt, or that it should be dismissed. My views in the matter differing from those of Messrs. Wilson & Storrs, counsel for petitioners, and it being one of importance in practice, I send it up to the court for determination."

Isaac G. Wilson, for petitioners.

¹Sec. 86 of the act; also see Rule 18 of the Supreme Court.

²*In re Daniel Winkens*, 2 Bankrupt Register, 113.

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DRUMMOND, J.—I think it would be proper for the petition to state that an application has been made to the other co-partner to join in the petition, and if this were done, then the consequence might follow which is implied by Rule 18. But there is nothing, as I see, in the bankrupt law, to prevent one partner from making his application for a discharge under the law from his individual debts, and from his debts as a co-partner of the firm. It seems to be desirable that the non-joining partner should know that the application is made, leaving it optional with him to come in if he pleases, or take any action he may choose. This petition does not state any thing about a refusal.

It seems to me that all has been done that the law requires when you have given notice to the other partner, and now it is optional with her whether she will come in or not. If she does not choose to come in, the court will go on and make its decree, and discharge these men both as members of the firm and individually. Of course the result would be that the firm would have to be declared bankrupt. The law does not require, nor does the rule—and in fact, the law seems to be otherwise—that before a member of a firm can be discharged under the bankrupt law, he must request the other members of the firm also to apply. The rule seems to give the option to that member of the firm who does not apply, to join in the application, and declares what the consequence shall be of a non-joinder.

I think you have brought yourself within this rule. It seems to me the only thing is that the other co-partner ought to be brought in as I stated. I think she ought to be notified in order that she may take such steps as she may be advised. That can be done certainly as well by a supplemental or subsequent act, as in the original petition. In stating that these are members of a firm of which she as a partner is one, it seems to me the petition does all that is required to be done. I think the proper course would be for an entry to be made of the fact that she has been notified of the pendency of the

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proceeding. Of course the petition must be amended and ask that the firm be declared bankrupt.

Notice of the filing of the petition must be given to the non-joining partners before adjudication of bankruptcy can be made. *In re Lewis*, 1 Bankrupt Register, 19; *In re Prankard et al.*, *id.* 51.

When one partner has asked for the benefit of the Bankrupt Act, the firm must, of necessity, be declared bankrupt. *In re Grady*, 3 Bankrupt Register, 54; *In re Greenfield*, 42 Howard's Practice R., 469.

Unless the firm is declared bankrupt no member can be discharged from his firm debts. *In re Little*, 1 Bankrupt Register, 74; *In re Bidwell*, 2 do. 78; *In re Grady*, 3 do., 54.

But if there are no firm assets the rule is otherwise. *In re Winkens*, 2, Bankrupt Register, 118; *In re Abbe*, *id.*, 26.—[Reporter.

ALICE B. GRUNNINGER, EXECUTRIX, vs. BRIAN
PHILPOT ET AL.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY,
1869.

1. PLEADING FAILURE OF CONSIDERATION.—In this defense to a note the plea should allege distinctly and with precision the actual consideration, and that there never was any other.

2. PARTIAL FAILURE.—The plea should set up to what extent and wherein there has been a failure.

3. FRAUDULENT REPRESENTATIONS—should be fully stated, with all necessary incidents of time and circumstance, and also that the party entered into the contract and gave the note relying upon such representations.

O. K. A. Hutchinson, for plaintiff.

Gookins & Roberts and *John G. Rogers*, for defendants.

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DRUMMOND, J.—I think that these pleas should be amended.

The history of the case, as stated in the pleas, seems to be that several persons agreed to form a joint stock company, the capital of which was to consist of various oil wells which they were to run; that the deceased, whom the present executrix represents, agreed to be a party to this arrangement and transfer certain portions of his interest which he had in the oil wells and oil lands, etc., to this company; and that as a part of the consideration of his entering into this agreement the note, which is the subject matter of this suit, was given by these defendants. The allegations set forth in the pleas are that the consideration has failed in whole or in part; also that there were some misrepresentations made by Mr. Grunninger.

The question is whether the account is presented with that distinctness and precision which the rules of pleading require in order to constitute a defense; and in looking over the pleas, to which the demurrer has been interposed, viz., the 3d, 4th, 5th, 6th and 7th pleas, it has struck me that they are wanting in that precision of language and distinctness of averment that are necessary. I will state, in the first place, what I understand to be the rule in such cases. When the defense is the failure of consideration to an action on a promissory note, either in whole or in part, the plea should allege distinctly and with precision what was the consideration for which the note was given, and that there was no other consideration. Where the plea alleges a total failure of consideration, it should also state that the consideration has failed, and should set forth in what respect, and where the plea alleges a partial failure of consideration it should set forth to what extent there has been a partial failure and wherein; not that as to the amount it is absolutely necessary that the proof should correspond with the plea in that respect, but the court should see from the averment in the plea to what extent there has been a failure of the consideration where a partial failure of consideration is relied upon. Where fraudulent representations are

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relied upon it must appear what they were, with all the necessary incidents of time and circumstance, and also that the party, relying upon the representations that were made, entered into the contract and gave the note, also of course alleging, as in the other case, what was the consideration, and the only consideration, of the note.

The third plea does not distinctly set forth what was the only consideration of the note, and it also sets forth that there was some fraud and deceit practiced by Mr. Grunninger; "that if they would purchase from him a certain interest which he pretended to have in certain oil lands situated in the county of Venango, Pa., for a certain price, he would become a party to the enterprise which is referred to in the second plea, upon the terms proposed in a writing obligatory,"—which writing obligatory, by the way, is not very distinctly set forth. "And thereupon the said defendants executed to the said Lawrence Grunninger the said promissory note in the said first and second counts in said plaintiff's declaration mentioned." There is no statement here as to what was the only consideration upon which that note was given. What was the consideration? Why the note was executed is one thing. There may have been a great many motives for the execution of the note; what is the consideration of the note is another thing, and it must be distinctly and substantially set forth. As has been suggested, there may be a *bona fide* debt due from one party to another which may be an open book account or in any other form, and from various motives the debtor may give a note. Now why he gave the note may be because the man asked him under particular circumstances, or at a particular time; but the consideration of the note would be an entirely different thing; it might be goods sold and delivered; or for land sold; or for any other good consideration.

The remaining pleas are all I think liable to the criticism of want of precision, in this respect, that they allege that Grunninger would pay into and contribute toward the assets of the

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company which was to be formed certain property; that Grunninger executed a certain writing; and that, to secure the payment of the sum of \$3,000, so agreed to be paid by the defendants, the promissory note was given. And they allege that although the company was duly and within a reasonable time formed and incorporated, as proposed in the agreement, "yet that said Lawrence Grunninger did not nor would contribute toward the assets nor pay into the property of said company the property in said writing obligatory mentioned, but wholly refused so to do." It does not distinctly appear to what extent or in what respect there was a failure to comply with the obligation on the part of Grunninger as entered into by him, nor is the consideration for which the note was given set forth with that distinctness that I think is necessary.

I think the same objection exists to all the pleas.

Where profert is made of an instrument in writing, and a question is made on that writing, it ought to be presented to the court, so that the court can see it.

Demurrer sustained to the 3d, 4th, 5th, 6th and 7th pleas, with leave to amend.

This case was carried to the Supreme Court, where the distinction between the *motives* of entering into a contract and its consideration is discussed. *Philpot vs. Grunninger*, 14 Wallace, 570.—[Reporter

Gaytes vs. American.

CAROL GAYTES, ASSIGNEE, vs. OSCAR L. AMERICAN
AND JOHN SMITH.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—
MAY, 1869.

An action of trover will not lie by the assignee against judgment creditors to recover the value of the bankrupt's property, sold on execution, prior to the commencement of bankruptcy proceedings.

Trover by the assignee against American and Smith, judgment creditors of the bankrupt, to recover the value of personal property levied upon by the sheriff under an execution from the Superior Court of Cook county issued and levied January 13th, 1868. The property was sold January 25th, and on the 13th of February following the debtor filed a petition in bankruptcy, upon which he was afterwards adjudged a bankrupt. Verdict having been rendered against the defendants, they moved for a new trial.

Bently & Hart, for plaintiff.

W. C. Grant, for defendants.

DRUMMOND, J.—The question raised on the trial and reserved was whether the action of trover was maintainable under the circumstances.

The cases of *Cooper vs. Chitty*, 1 Burrow, 20, of *Smith vs. Milles*, 1 Term Reps., 475, and *Price vs. Helyer*, 4 Bingham, 597, decide that a sale by a sheriff after an act of bankruptcy, although it may be before the issuing of the commission of bankruptcy, was a conversion of the property under the English law of bankruptcy, and also that an action of trover could be maintained under such circumstances, but that an action of trespass could not be maintained when it was sought to make

the officer a trespasser by relation merely. Under the English bankrupt law the transfer of the property to the assignee related back to the act of bankruptcy, and it made no difference how secret that act might be (it might be entirely unknown to the officer who took the property) if there had been an act of bankruptcy prior to the time when the sheriff took possession of the property under his writ, the transfer relating back to the act of bankruptcy interrupted and set aside all subsequent acts, and therefore the sheriff was held responsible,—a rather hard rule where he acted in good faith; but that was the undoubted law under the English Act of Bankruptcy. Inasmuch as it was held by these authorities that there was relation back to the act of bankruptcy whenever there was a conversion of the property after the act of bankruptcy, then the sheriff was responsible in an action of trover, because the gist of the action was the wrongful conversion of the property.

Now, what is the reason of the rule under our law?

The 38th section of the bankrupt law provides “that the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which an order may be issued by the court, or by a register in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy, under this act.” Then the filing of the petition is the commencement of proceedings in bankruptcy, and the 14th section declares that the assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, so that it will be seen that our law is different from the English law. The transfer of the property under the English law related back to the act of bankruptcy, while the transfer of the property under our law relates back to the commencement of proceedings in bankruptcy, viz., the filing of the petition.

That being so, upon what principle is it that the action of

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trover can be maintained in this case consistently with the rule established under the English law, unless there is a wrongful conversion of the property, when by relation it belongs to the assignee? What were the facts? At the time that the execution issued, viz., on the 13th day of January, 1868, the bankrupt had not filed his petition. The assignment, then, did not relate back to that time. At the time of the sale, which was on January 25, 1868, the petition had not been filed. The relation of the transfer of title to the property which belonged to the bankrupt was only to the 13th of February, 1868, when the petition was actually filed. The question then arises, the whole act of possession and of conversion having been committed before the filing of the petition, whether the assignee can maintain the action of trover. I am inclined to think that he cannot.

All that existed at the time of the commencement of the proceedings in bankruptcy was a right of action. There was no conversion of the property after the filing of the petition. We have seen how, by the doctrine of relation, a conversion subsequently would authorize the assignee to maintain the action of trover. The argument of Lord Mansfield, in the case of *Cooper vs. Chitty*, 1 Burrow, 20, is unanswerable on this point, that, although the assignee has not the possession of the property at the time of the conversion, and it is not in existence and may not be until long after the conversion, still the doctrine of relation comes in and declares that if there is a conversion after the act of bankruptcy that clothes the assignee with all the rights that the bankrupt would himself have had over the property; so, in order to preserve the rights of the general creditors, the action is maintainable. But I think, considering the peculiarity of the action of trover, and as the essence of it is a wrongful conversion, that the assignee must have been able to maintain this action at the time of the conversion, and, inasmuch as he could not have done so, the doctrine of relation did not go far enough back in this instance. I think that the action of trover is not maintainable.

New trial granted.

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The assignee may sue in trover for a conversion after proceedings in bankruptcy commenced before his appointment, though for a conversion prior to the filing of petition he must sue in equity. *Garland vs. Carlisle*, 4 Clark & Finnelly, 693, approved and cited in *Mitchell vs. McKibbin*, 8 Bankruptcy Register, 548.—[Reporter.

SAMUEL NICHOLSON vs. THE CITY OF CHICAGO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1869.

ENTERING APPEAL NUNC PRO TUNC.—Where an appeal bond to the Supreme Court has been presented and approved, but no formal appeal prayed or allowed, though it was evidently the intention of the parties to appeal, and it was so understood by the court, it is competent for the court subsequently to enter an order *nunc pro tunc* allowing the appeal.

C. Beckwith, for the city, moved for an order *nunc pro tunc* amending the record to show that an appeal was prayed. Final decree was entered on the 7th of January, 1867. Appeal bond was approved Jan. 16, 1867. Counsel learned that the appeal was not of record, March 26, 1869.

S. A. Goodwin, for plaintiff, read affidavit of E. C. Larned, that he was present in the court room when S. A. Irwin, corporation counsel, stated to the court that the finance committee of the common council had under consideration, the matter of taking an appeal and that their action was to depend on the opinion of Judge Curtis, to whom the matter had been referred by the city; that he does not recollect that an appeal ever was prayed or allowed in said cause; that Irwin, only stated that he wished to appeal.

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He also cited *Barrel vs. Transportation Company*, 3 Wallace, 424, to show that the allowance of the appeal was actually necessary and that a petition presented for the filing of a bond is not the allowance of an appeal; also, *Seymour vs. Freer*, 5 Wallace, 822.

DRUMMOND, J.—It was understood by all the counsel, and by the court, that an appeal was asked for by the city and allowed by the court. That was done orally, and no formal order was entered, nor asked for, nor considered necessary. In such a case, if we can make an order *nunc pro tunc*, it ought to be made. I do not suppose Mr. Irwin did come in and formally ask for an appeal in so many words, but he did in reality. The court acted upon it, although the court did not direct the clerk to enter an appeal. I never could have understood that it was necessary. It is a sort of interpolation that they have made in the Supreme Court. At any rate, the question has never been made, and there is nothing in the statute about it.

The case cited from 3 Wallace is the first decision that has come under my observation where it was decided by the Supreme Court that an allowance of an appeal entered of record in the court was indispensable. It seems to me that it would be sticking to the bark to hold that this appeal was not in reality well taken. It may be true that the counsel for the city did not come to the court and formally say, "I ask for an appeal," and the court did not formally say, "The appeal is allowed," but the counsel for the city came into court and intimated to the court, and gave the court to understand, that the city intended to appeal. The court so understood it, and when the court approved of the bond the court did it upon the understanding that the city desired to take an appeal, and intended to prosecute it. That being so, it seems to me that it would be giving rather too much weight to this technical rule which the Supreme Court has established recently that the party must come into court and pray for an appeal, and

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that the court must allow it as a matter of form. I think that it would be very difficult to carry out this new rule in all cases, one of which has just been stated by the counsel for the city, where the court had adjourned. Therefore, I am prepared to enter an order, although I think, to all intents and purposes, the appeal was prayed and allowed. I will direct the entry of an order *nunc pro tunc*, allowing the appeal.

UNITED STATES, Ex REL., &c., vs. THE UNITED
STATES EXPRESS COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1869.

1. UNSTAMPED LETTER OF ADVICE.—It is not a violation of the post office laws for an express company to carry with a money letter or package, an unstamped letter of advice concerning said money.

2. It was the intention of Congress, in the Act of March 3, 1845, to permit an unstamped letter of advice relating merely to the article shipped to be transmitted with such article.

DRUMMOND, J.—This case is submitted to the court on an agreed statement of facts to the following effect: that the defendant is an express company, and common carrier of money between Chicago and Springfield, Illinois, over the Chicago, Alton & St. Louis Railway, a United States mail route; that the packages of the express company are transported in a car under their exclusive control; that the express company does not carry letters unless in a government stamped envelope, except as money packages received for transportation, and letters enclosed therewith relating there-

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to. On the first day of May, 1868, the express company, in the usual course of its business, received, at Chicago, a package in a letter envelope unstamped, containing a sum of money and a letter relating thereto, addressed to the consignee in Springfield, Illinois, receiving the usual rate of pay for transmitting such a sum of money.

The company carried the package to its destination, over and upon the route aforesaid, in a car such as has been described, and delivered the same to the consignee. It is claimed, under this statement of facts, that the defendant violated the laws of the United States concerning the conveyance of letters from place to place between which the mail is regularly transported under the authority of the postoffice department. The question is whether the act set forth in the agreed statement of facts comes within any of the laws upon that subject.

We understand that it is claimed to be a violation of the 9th section of the act of March 3, 1845,¹ which declares that it shall be unlawful for any person or persons to establish any private express for the conveyance of letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips, of any letters or packages or other matter properly transmittible in the United States mail, except newspapers, pamphlets, magazines, and periodicals.

If this section stood alone there might be some question whether the words "in any manner to cause to be conveyed * * * any letters or other matter properly transmittible in the United States mail," did not cover the case as stated; but the 10th section of the same law declares "that it shall not be lawful for any stage coach, railroad car, steamboat, packet, boat, or other vehicle or vessel, nor any of the owners, managers, servants, or crews of either, which regularly perform trips at stated periods on a post route, or between two or more

¹ 5 U. S. Statutes at Large, 731, 735.

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cities, towns, or other places, from one to the other, over which the United States mail is regularly conveyed * * * to transport or convey, otherwise than in the mail, any letter or letters * * * except such as may have relation to some part of the cargo of such steamboat, packet, boat, * * * or to some article at the same time conveyed by the same stage-coach, railroad car, or other vehicle."

The question is whether this case is not fairly within the exceptions contained in the 10th section. We think it is.

The letter which was transmitted by the express company was in an envelope containing money, and related to the money, and we think that it was the intention of Congress in framing this 10th section to allow a letter to be sent accompanying any article of property, provided it related merely to the article of property or money sent, and did not concern any other subject. In other words, it was the intention of Congress to permit a party who transmitted any article of property or money, by an express company or otherwise, to send at the same time and by the same mode of conveyance, although it might be between cities where there was a post route, and where the United States mail was carried, a letter of advice, merely relating to the money or property thus sent. The main object of the 9th section seems to have been to prevent the establishment of express or other companies to come in competition with the transmission of the mail under the authority of the government, although it was clearly intended also to prevent the transmission or conveyance of letters by such conveyances except in connection with any article of property sent.

These provisions of the post-office law being in derogation of common right, must be construed strictly, and in the absence of clear and explicit language forbidding the carriage of a letter, under the circumstances indicated, we must hold that the right to do so is not interfered with.

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The 8th section of the act of August 31, 1852,¹ has been referred to. The object of that section was to authorize the Postmaster-General to provide suitable letter envelopes, with proper water-marks and other guards against counterfeits, which were to be sold to any person at their cost, and which when used by enclosing a letter in such government envelope thus stamped, might be transmitted by express companies or by any one between places where there was a post route, and where the United States mail was carried, provided the envelope was duly sealed or closed in such a way that the letter could not be taken from the envelope without tearing or destroying it. This law simply declared that when letters were within these government envelopes they might be carried in any quantity by express companies, so that when they reached their destination and were received by the person to whom they were addressed, they were defaced in such a way that they could not be again used. The government thus reaped all the advantage of their regular transmission through the mail, and the defacement of the stamps by the post-office officials. Without this provision it is apparent, that, the express companies would not have this authority, and the agreed case declares that the defendants have never carried letters in any other way than is thus provided, or as accompanying and relating to some article of property or money sent.

The instructions given by the post-office department of 1866, are entirely consistent with the view which we have expressed of the law.

Davis, J., concurring.

¹ 10 U. S. Statutes at Large, 141.

JOHN RUCH vs. CITY OF ROCK ISLAND.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1869.

DEDICATION.

1. WHAT CONSTITUTES.—Where, in a town plat, one block appears unsubdivided, and without number or mark, that does not constitute a dedication to public purposes; but a statement by the owners, at the time, that it was to be a public square, is a dedication for that purpose.

2. IRREVOCABLE.—A dedication, once made, cannot be recalled; and the intention of the owners at the time is to be considered—not their intention at any subsequent time.

3. ESTOPPEL.—A purchase by the city of the rights of parties occupying ground claimed as dedicated, does not compromise its claim under the dedication.

Ejectment for a block of land in Spencer & Case's addition to the town of Stephenson, the former name of Rock Island. The defendant claimed by virtue of an alleged dedication. The facts are stated in the charge.

DRUMMOND, J., charged the jury as follows: .

Jonah H. Case and a Mr. Spencer were, in May, 1836, the claimants to a certain tract of land within the present corporate limits of the city of Rock Island, and on the 17th of that month, laid off a town upon it and recorded the plat in Rock Island county which was called Spencer & Case's Addition to the town of Stephenson (the former name of the city of Rock Island). On the 21st day of May, 1836, one of the parties entered the land, and became the purchaser from the United States. The plat, as recorded, represents a town bordering upon the Mississippi river; the addition to the town consisting of blocks, lots and streets—the streets being

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named and the blocks and lots numbered. Near the center of this plat, as thus made and recorded, appears a block fronting on streets—a square block—without any number to it, and without anything upon it to designate any particular object or appropriation of the land. The blocks adjoining this block of land are divided somewhat differently from the other blocks, the alleys running in different directions, and all the lots being made to front on this unnumbered block.

It is true that, where a plat is made and recorded in the way in which this was, if a mark is put upon the plat, indicating that a certain part is for a particular purpose, a legal presumption arises that it is appropriated to that purpose, as in the case of streets; and if, in point of fact, this vacant block of land had been marked or designated in any way, that would have created a legal conclusion of its appropriation to that particular use.

It would seem, therefore, as though there was a peculiarity connected with this block, to show that it was to be something different from the other blocks, but it is necessary that there should be some other proof, in order to show what was the particular object or reason why it was left in this condition. For example, if the owners had intended it should be appropriated as a public square, or to any public use, it was easy so to designate it.

Is there any evidence in the case to show that the minds of the owners did form a purpose, and that that purpose was a finished, complete purpose, so as to enable us to say that this particular lot of land was appropriated to a general or public use?

It is clear that there was an unformed purpose in the minds of the owners of the block, because, if they intended to appropriate it to any particular public use, it could have been so stated on the plat. They did not choose so to state. Now, the only clear evidence we have prior to the sale of these lots, is contained in the deposition of Mr. Powers.

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He says that he was empowered by the parties to sell these lots, and they were sold in the fall of 1836. In the meantime, on the 8th of June, 1836, between the date of entry and time of sale, Mr. Case sold an interest in the land to Mr. Spencer, thus, as it were, confirming the plat that had been made of the Spencer & Case Addition to Stephenson. At the time of this sale, it was stated by Case to Powers, who made the sale under his directions, that this was a public square. That is all that can be gathered from his testimony—that they intended, or Mr. Case intended, this as a public square.

It was undoubtedly competent for Spencer and Case, in connection with the plat which had been made, to dedicate this square at any time to the public, or to dedicate it to any specific purpose, and in connection with what appears on the face of the plat, I think we may infer that he had a right to dedicate it to any specific public use or purpose.

Was that done? Was it done at the time that these lots were sold? Did Mr. Spencer and Mr. Case, at that time, intend to give the public to understand that this square was to be appropriated to public use for the benefit of the proprietors of lots in their Addition?

If there was this appropriation at the time, by Mr. Spencer and Mr. Case, then I think that appropriation, after it was once made, could not be recalled.

There is the evidence, independent of the testimony of Powers, of one or two other witnesses which it is claimed is corroborative of his testimony. It is for you to say whether there was at that time a purpose so expressed of Messrs. Spencer and Case to make a general appropriation of this square to the public. If such was the intention, a simple declaration was sufficient.

If, however, you believe, from all that there is in the case, that there was not this intention on the part of Spencer & Case, then it may become necessary to consider the next question that arises in the case.

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In 1843, it is certain that acts were done by Spencer and Case which were inconsistent with the theory that a general appropriation had been made in 1836. But remember that this is not to be taken as absolute evidence of the state of mind which existed in 1836. They may have had one purpose in 1836 and another in 1843. The point for you to determine is, what was the purpose in 1836. In 1843, they made various deeds, one to the trustees of the Methodist Church, one to the trustees of the Baptist Church, and in 1849, they made a deed to the trustees of schools.

It may be an important question for you to consider in connection with this part of the case, and having a bearing on the second question, whether they had changed their purpose on coming to examine the plat, and finding no particular appropriation upon it, and not recollecting that an appropriation had been made in 1836, and may have come to the conclusion that they would re-assert any power or authority which they once had. Is this the conclusion to be drawn from their acts, or that they had never parted with their rights? These are questions proper for you to ask and to answer.

I do not think that any very great stress should be laid upon the acts of the city council in their negotiations with the Baptist Church. The Baptist church was there upon the square, having a possessory claim. It was certainly competent for the city to purchase that claim, whatever it might be, without compromising any rights which they might previously have acquired. A school-house was erected on this lot in 1841. It is said that that is entirely consistent with the special appropriation that was intended by Mr. Case.

It is for you to say whether you think, under all the facts and circumstances, there was an original dedication, to the general public.

Verdict for the defendant.

A parol dedication is good. *Warren vs. Town of Jacksonville*, 15 Illinois, 236.

The intention of a party, manifested by expressed consent or acquiescence in the user, will govern in determining what is a dedication. *Id.*;

Gaytes vs. Hibbard.

Dimon vs. The People, 17 do., 416; *Marcy vs. Taylor*, 19 do., 634; *Proctor vs. Town of Lewiston*, 25 do., 153.

For a full discussion, see *Rees vs. City of Chicago*, 38 do., 322; *Gentleman vs. Soule*, 32 do., 271; also, *Lakin vs. Ames*, 10 Cushing, 198; *Durgin vs. City of Lowell*, 8 Allen, 398; *Canal Trustees vs. Haven*, 11 Illinois, 554; *President, &c., vs. Indianapolis*, 12 Indiana, 620; *Mayor, &c., of Macon vs. Franklin*, 12 Georgia, 239; *Attorney-General vs. Merrimack Manufacturing Company*, 14 Gray, 586; *United States vs. Illinois Central R. R. Co.*, Volume 2 of this Series, 174; *Nelson vs. City of Madison*, 3 do., 244.

The owner may give evidence of his declarations as to the dedication, as well after as at the time, to find what was the original purpose. *Proctor vs. Town of Lewiston*, *infra*.—[Reporter.

CAROL GAYTES, ASSIGNEE OF THE MERCANTILE MUTUAL
FIRE INSURANCE COMPANY VS. WILLIAM G. HIB-
BARD AND FRANKLIN F. SPENCER.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1869.

1. CERTAINTY OF TIME OF PAYMENT.—A premium note to a mutual insurance company, payable "at such times as the directors of said company may, agreeably to their act of incorporation, require," is rendered due and payable when the directors have properly required the money to be paid.

2. CERTAINTY OF PAYEE.—If made payable to the company, "or the treasurer for the time being," these latter words are simply indicative of the officer through whom the payment might be made.

Demurrer to declaration upon the following instrument, given for premium upon a policy of Insurance.

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"For value received in policy No. 73, dated 12 August, 1865, issued by the Mercantile Mutual Fire Insurance Company of Chicago, we promise to pay said company, or the treasurer for the time being, the sum of two hundred and fifty dollars, in such portions and at such times as the directors of said company may, agreeably to their act of incorporation, require."

The grounds of the demurrer appear in the opinion.

Hitchcock, Dupee & Evarts, for plaintiff.

Clarkson & Van Schaack, for defendants.

DRUMMOND, J.—In support of the demurrer it is insisted that the instrument sued on is not a promissory note; that it is not certain as to the person to whom the money was payable, it being to the Mercantile Mutual Fire Insurance Company or its treasurer for the time being.

Secondly, that it is not certain as to the time of payment, there being no time specified in the instrument when the money was to be paid. And, thirdly, that there is no certainty in relation to the fact of payment at all.

I do not know that it is necessary for the court to decide whether this was a promissory note, technically so called. The question is, whether the count in the declaration is sufficient. It avers that the directors of the company did require a certain portion of the \$250 to be paid at a fixed time, naming the time, and that the money was not paid at that time, and that, by the charter of the company, the whole sum became payable.

I hold this to be a contract, in substance, to pay two hundred and fifty dollars to the Mercantile Mutual Fire Insurance Company of Chicago; the words "or the treasurer for the time being," being simply, I think, indicative that the money might be paid to the company through its treasurer.

Then the time at which payment was to be made became certain when the directors of the company, agreeably to their act of incorporation, fixed the time requiring the money to

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be paid. So, according to the rule, *id certum est quod certum reddi potest*, it will become certain precisely on the same principle as money payable on demand. There the time when it is payable is uncertain. It does not technically become payable until the demand is made. The demand having been made, that which was uncertain has become certain. So here, this is in the nature of a demand by the directors of the company to make payment, and when that demand is made, then the time is fixed and certain.

I think the demurrer must be overruled, with leave to the defendants to plead if they so elect.

A written promise to pay a sum "in such manner and proportions, and at such time and place as he shall from time to time require," is a promissory note. *Goshen, &c., Turnpike Co. vs. Hurin*, 9 Johnson, 217; *Washington County Mutual Insurance Co. vs. Miller*, 26 Vermont, 77.

An instrument as follows: "I promise to pay M. \$172 when I collect a note received from him on T.," is due and payable on the occurrence of the contingency. *Walker vs. Phillips*, 85 Texas, 784.

For a full exposition of the maxim "*Id certum est quod certum reddi potest*," consult Broom's Legal Maxims, 590.—[Reporter.]

DUNKLE ET AL. VS. WORCESTER ET AL.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1869.

1. SUPPRESSING DEPOSITION.—A deposition must be suppressed when it does not affirmatively appear that the witness resided more than one hundred miles from the place where the cause was to be tried.

2. JURISDICTIONAL WORDS.—It is not competent for the court to supply a jurisdictional word, though the omission may appear to be merely clerical.

Motion by defendant to suppress a deposition for a clerical omission of the word "reside" in the certificate of deposition taken *de bene esse*, in New York, the certificate reading "that the witness in New York."

DRUMMOND, J.—The motion to suppress this deposition, taken in New York, for the reason that it did not appear by the statement of the officers what the reasons were for which the deposition was taken, it being an *ex parte* deposition, must be sustained, although I suppose it is a clerical error in the certificate of the officer. "And I certify that the reason for taking such deposition is, and the fact is, that the said witness in the city of New York, more than one hundred miles," etc. Probably the word left out is "resides," the statute authorizing depositions to be taken where a witness lives more than one hundred miles from the place where the cause is to be tried. But I believe the Supreme Court have held that it is not competent for us to supply any omission of this kind. It is *strictissimi juris*. It must affirmatively appear on the face of the certificate, or in some way, that the cause specified in the statute actually existed. It is a technical point of the greatest nicety, I admit, but if we commence supplying words, the question is, where shall we stop? It may be that

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the witness, instead of living in the State of New York, was simply there for the time being, and it might happen, therefore, that an Illinois or Chicago witness might temporarily have been in New York, and that his deposition might have been taken while he was there. As the counsel said, we can supply the word that the witness "was in" New York aforesaid, more than a hundred miles, etc. That illustrates the danger of supplying an omission of this kind, and although it is most probable that the word "reside" was the word intended to be inserted by the officer, still, we must take it as it stands.

Deposition suppressed.

The act of congress allowing testimony to be taken *de bene esse* when the witness resides more than one hundred miles from the place of holding court, was repealed by the act of May 9, 1872. 17 U. S. Statutes at Large, 89. Now reasonable notice in writing must be given of the witness' name, the time and place of taking, etc.—[Reporter.

ALICE B. GRUNNINGER, EXECUTRIX, &C., vs. BRIAN
PHILPOT ET AL.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1869.

1. RECEIVING DEPOSITIONS TAKEN IN STATE COURT.—It is proper practice for the federal court, upon application before the trial, to allow depositions taken in a suit between the same parties for the same cause of action, to be filed as evidence.

2. PARTY OBJECTING.—A party objecting should show affirmatively that there was mistake, misapprehension, or other good cause why they should not be received.

3. In doubtful cases, it is better, ordinarily, to admit than to exclude evidence.

The same defendants were sued by this plaintiff in the Superior Court of Chicago on the same cause of action. That suit was dismissed at plaintiff's cost, by plaintiff's attorney, he not being ready for trial. Suit being instituted in this court, and the cause being reached upon the call of the docket for trial, it is submitted by defendants whether the depositions taken and filed in the cause in the Superior Court can be used in this case.

Hutchinson & Luff, for plaintiff.

Gookins & Roberts, for defendants

DRUMMOND, J.—The practice that has been pursued heretofore in relation to depositions of this kind, has been for the party, before the trial, to make application to the court for leave to read the depositions taken in the former suit, and that leave, has I believe, in all cases been given. The question, I think, has never been distinctly presented and argued at length as to the admissibility of this kind of tes-

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timony, but it has generally been considered as competent for the court, in its discretion, to allow it to be read, on the ground that the parties are the same, the suit the same, and both parties have had the opportunity of examining and cross-examining the witnesses; therefore, all the usual tests of truth have been applied, and it is presumed that the testimony and statements of the witnesses are correctly set forth in the depositions. At the same time, I can easily imagine that cases may arise where it would be improper for the court to allow depositions taken in this way to be used on the trial of another cause; as, for example, where, owing to misapprehension, misinformation, or mistake, or from any cause operating upon a party or his counsel, a witness was not interrogated or cross-examined as to certain facts. In such a case, it might not promote justice to allow the deposition to be read. But the inclination of my mind is, that where a deposition was regularly taken and cross-examination permitted, the deposition can be read; and I think it would be incumbent on the party objecting, to show, upon the application, which should be made to the court in the first instance for leave to read the depositions, why they should not be read, giving some good and substantial reason.

It is a very close question, I admit, under the authorities, but while they are somewhat in conflict, still, in doubtful cases, I am always inclined in favor of the admissibility of the testimony. I think, in all cases of doubt, it is better to admit than to exclude evidence. It ought to appear clearly that the evidence is incompetent in order that it should be excluded; therefore, I should feel inclined, in this case, to admit this testimony, unless it is made to appear to the court in some way that it would be prejudicial to the rights of one of the parties for the court to receive it..

The depositions will be allowed to be read unless special reason is shown to the contrary.

Huchberger vs. Home Ins. Co.

LEHMAN HUCHBERGER ET AL. vs. THE HOME FIRE
INSURANCE COMPANY OF NEW YORK.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEB-
RUARY, 1870.

RIGHTS UNDER INSURANCE POLICY.

1. The sixty days for an insurance policy, before right of action accrues, begin to run from the time of furnishing the proof, not from the time of furnishing additional proof required by the company.

2. FRAUD OF INSURED.—If the insured, with intent to defraud, makes claim for a larger loss than he actually sustained, he forfeits his rights.

3. BURDEN OF PROOF, in establishing this defense, is on the defendant, and the evidence must be either direct and positive, or the circumstances must be convincing, and admitting no other natural conclusion.

4. INTEREST ON POLICY.—On verdict for insured, the jury should allow interest from the commencement of the action.

Emery A. Storrs, for plaintiffs

John Van Arman and *J. H. Knowlton*, for defendant.

BLODGETT, J., charged the jury as to the law, as follows:

This suit is brought upon one of several policies of insurance amounting in the whole to \$46,000, one of which was issued by defendant on the stock of dry goods in plaintiffs' store, at No. 173 Lake street, in this city. There is no question as to the issue and validity of the policy, nor is there any question as to the fact that, on the evening of March 2d, 1867, a fire occurred in that store, which subsequently destroyed the stock of goods then in the store, the portion saved being only worth a little over \$6,000; nor is it denied that the plaintiffs furnished the proper agent of the defendant, in due time, the proofs of loss required by the policy; but it is insisted that the plaintiffs did not comply

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with the conditions of the policy, which are precedent to the right of action. The policy requires the insured forthwith to give notice in writing, to the company, of the loss sustained, and as soon as convenient thereafter, furnish proof of loss, etc., and that the insured, if required, shall submit to a further examination on oath, etc. It is claimed that no notice of the loss was given within the meaning of this clause of the policy. It is also claimed, that the loss, by the terms of the policy, does not become payable until sixty days after due notice and proof of loss, and that, inasmuch as the plaintiffs furnished to the agent of the defendant their formal proof of loss on the 13th of March, and afterward submitted to a further examination on oath, at the request of the adjuster of the defendant, in regard to the details of their business, the proofs of loss within the meaning of the policy were not completed until this examination was reduced to writing and sworn to, which was on the 22d of March; and as this suit was brought on the 16th of May, the sixty days had not elapsed, and that this suit was therefore prematurely brought.

It is true, that the notice of loss, as required by the policy, should have been given and proved, unless you are satisfied from the evidence that it has been waived.

As to the time when the right of action accrued, I am of opinion that the sixty days began to run from the furnishing of the proofs of loss, and not from the further affidavit; that the further examination is an act on the part of the insurer, and has no reference to the period when the time begins to run, for if their position is correct, the insurance company could extend indefinitely the time of payment. They might keep calling for further proof from time to time, and insist as long as they chose that they were not satisfied in regard to the facts of the loss.

But the chief defense set up to avoid the liability arising upon the admitted facts, to which I have referred, is, that plaintiffs fraudulently presented and insisted upon a claim

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against the defendant for a much greater loss than they actually had sustained; and the real question in this case is whether the claim of loss made out by the plaintiffs and demanded from the defendant, was for an amount which plaintiffs knew was greater than the loss actually sustained. If plaintiffs, knowingly and with intent to defraud the defendant and other insurance companies who had insured their stock of goods, made up a false and exaggerated statement of the amount and value of their stock of goods in the store at the time of the fire, and destroyed or damaged, they thereby forfeit all claim against the insurers. In cases of this kind, the plaintiff must come into court with clean hands. The insured is presumed to know better than any one else the value of his property and the amount of his loss, and is bound to make his statement of loss honestly, without any attempt to obtain more than his actual damage; and this rule of law that thus defeats all claims unless honestly made, is intended to protect insurance companies from frauds which might otherwise be perpetrated on them. It is a rule which can do an honest man no harm.

I do not mean by this, that a person who has sustained a loss for which an insurance company is liable, is obliged to state the exact amount of his loss in dollars and cents, with arithmetical accuracy, for that, from a variety of circumstances, is frequently impracticable; but he must disclose the whole truth, and nothing but the truth, as nearly as he can come at it at the time by reasonable effort on his part. If the evidence in this case, taken altogether, satisfies your minds that the plaintiffs did, knowingly and fraudulently, present a claim for a loss greater than they had sustained by the fire in question, then they cannot recover in this action.

This is really the only law directly involved in this case, but there are some rules of evidence applicable to the case, to which it is proper I should call your attention.

The burden of proof to make out the defense insisted upon is upon the defendant.

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The law does not allow you to presume fraud without proof, and it must be such proof as admits of no other fair construction. I do not mean by this, that the defendant is bound to establish fraud by positive and direct evidence, because that is frequently impossible; but the evidence of fraud must be either direct and positive, or the circumstances must be so strong, convincing and preponderating as to admit of no other rational conclusion. The defense interposed, if sustained, stamps the defendants as swindlers and dishonest men. You should, therefore, be cautious in your consideration of evidence tending to lead you to so serious a conclusion. Yet, if the evidence adduced is so convincing in its character as to satisfy your minds that the plaintiffs intended to perpetrate a fraud on the insurers, you then need not hesitate to pronounce that conclusion by your verdict. It is as essential to the ends of justice that the guilty should be punished as that the innocent should be acquitted.

If you should conclude that in making up their accounts of their loss, plaintiffs acted in good faith, and made, as nearly as they could under the circumstances, a truthful statement, without any intent to defraud defendant, you will find for the plaintiffs, and ascertain their damages by adding interest from May 16, to the amount of the policy.

Verdict and judgment for plaintiff.

Consult *Huchberger vs. Merchants' Fire Insurance Co.*, Vol. 4 of this Series, 265, and notes thereto.—[Reporter.]

In re Terry.

In re LYMAN TERRY.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY, 1870.

IN BANKRUPTCY.

1. **PROCURING PARTNER TO LEAVE THE STATE.**—It is not an act of bankruptcy on the part of one partner to influence or procure the departure of another from the state.

2. **INFORMAL DISSOLUTION OF PARTNERSHIP.**—In Illinois, if the certificate of dissolution of a limited partnership does not fulfill the requirements of the statute, the partnership still continues, and such informal dissolution does not affect the rights of creditors.

This is a proceeding on the part of the creditors of the firm of Arbogast & Terry, to declare Lyman Terry, who was a special and limited member of said firm, a bankrupt, and subject his private property to the debts of said firm.

The original petition was against Orbogast and F. P. Terry, and the petitioners then filed an amendment asking adjudication against Lyman Terry; to this amended petition Lyman Terry answered.

It appeared that this special partnership was formed on the first of March, 1869, Arbogast contributing no money to the assets of the firm, but only undertaking to put in his skill in the art and business of manufacturing glass. The two Terrys put in \$1,250 each, and Arbogast and F. P. Terry were the general partners. The proceedings to perfect this association as a limited partnership within the statutes of this state were admitted to be all regular, and under this law the special partner only became liable for the money put into the firm. It was admitted that Lyman Terry duly paid in his \$1,250, and there was no evidence or pretence that he ever with-

In re Terry.

drew this capital. On the 20th of March the firm were greatly in need of money to pay their laborers, and Lyman Terry procured \$1,500 by his own note to Page & Sprague, and advanced it to the firm, with an express understanding that he should be refunded out of the proceeds of the first glass got to market. There seems to be no dispute but that this money was paid and went into the affairs of the firm. On the 24th of March, steps were taken for the dissolution of this partnership. Arbogast took \$125, and assigned his interest to F. P. Terry, and a stipulation for dissolution was entered into, but no certificate was filed in the Recorder's office, nor was the notice required by statute¹ duly published.

On the 30th of March, F. P. Terry, who had continued the control of the business of the firm after the attempted dissolution, was in want of more money, and applied to Lyman Terry for it. The application resulted in his obtaining from Lyman Terry the \$2,000 he needed, he giving as security a bill of sale for 1000 boxes of glass—465 of which were delivered on the 3d of April, and 60 boxes on the 6th of April, making 525 boxes in all—with an agreement that whatever the glass came to over the \$2,000, should apply on the \$1,500 advanced to the firm.

Hervey, Anthony & Galt, for petitioning creditors.

H. B. Hurd and John A. Hunter, for Lyman Terry.

BLONGERR, J., charged the jury as follows:

It is insisted that the successive transactions between these partners make Lyman Terry guilty of the acts of bankruptcy provided for in the statute, which brings him within the clauses of the bankrupt act. The acts insisted upon as bringing him within the operation of these clauses, are:

- 1st. Procuring the departure of Arbogast from the state.
- 2d. Giving the judgment note with others to Booth.
- 3d. The buying of the 1000 boxes of glass on the 30th of

¹ 1 Gross' Statutes, p. 438, §16.

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March, and taking possession of the 525 boxes on the 3d and 6th of April.

As to the first of these grounds,—that of procuring the departure of Arbogast from the state,—I do not see how this can be held to be an act of bankruptcy on the part of Lyman Terry. It was such an act on the part of Arbogast. But that this act of Arbogast is to make Lyman Terry a bankrupt, I do not see, any more than it would any stranger who had used his influence or advice to procure Arbogast's withdrawal from the firm.

The note given Booth, and used as a means, may have been a fraud on Arbogast,—may have deceived him,—but how are the creditors left any worse off? Arbogast put no money into the concern, and under the evidence it seems doubtful whether his services were of any value to them. At all events, the evidence shows that they lost money all the time he stayed, and only made money, if at all, after he left. But it is contended that the buying out of Arbogast was dictated by an honest regard for the interests of the firm.

We now come to the transaction of the 30th of March, when Lyman Terry let F. P. Terry have the \$2,000 on the bill of sale of 1000 boxes of glass. It is contended that at this time Lyman Terry was still a member of this firm, and that, owing to informalities in the proceeding in not filing the certificate of dissolution, the dissolution had not taken effect as to creditors. I agree with the counsel for the creditors on this point, that the partnership still continued. But in my opinion this is no reason why Lyman Terry could not, if the transaction was fair, buy this glass. The business of the firm was to manufacture glass and sell it. This was their only resource from which to raise money to meet their daily expenditures. Lyman Terry had no interest in the firm save to the extent of the \$1,250 capital he had put in. As to all other transactions, he could deal, buy and sell, like any third party.

Verdict against creditors, as to Lyman Terry.

In re Sykes.

In re JAMES W. SYKES.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH,
1870.

IN BANKRUPTCY.

1. **COMMERCIAL PAPER DEFINED.**—A note given by a merchant for money loaned is "commercial paper" within the meaning of the Bankrupt Act. The term means negotiable paper given in due course of business, whether the element of negotiability be given it by the law merchant or by statute.

2. **REFUSAL ON GROUND OF VALID DEFENSE.**—A refusal by a debtor, acting in good faith, under the advice of counsel, to pay his note, on the ground that he had a valid defense, is not an act of bankruptcy.

3. **ADVICE OF COUNSEL.**—So, if the debtor is in good faith advised by counsel that the holder has not a good title to the note, his refusal to pay it is no act of bankruptcy.

4. **UNACCEPTED PROPOSITIONS NO ESTOPPEL.**—Nor does the fact that offers and propositions for the payment of the note had been made, necessarily preclude him from making his defense.

5. **PROOF OF ACTS OF BANKRUPTCY CONFINED TO ALLEGATIONS.**—The proof must be confined to the acts of bankruptcy charged in the petition; nor can a refusal at a date prior to that stated in the petition be shown in evidence.

6. **ACTUAL SOLVENCY—HOW MATERIAL.**—The fact that the maker is actually solvent and met all his other paper promptly, is a proper element as rebutting any presumption of refusal on the ground of insolvency.

7. **PROCEEDINGS IN SUIT AT LAW.**—A stipulation in a suit at law upon a note, giving time to plead, does not operate as an extension of time upon the note, as against the Bankrupt Act; but the proceedings in such suit may be given in evidence in determining the good faith of the defense.

The petitioner, the Manufacturers' National Bank of Chicago, asks that the respondent, James W. Sykes, be adjudged a bankrupt.

The act of bankruptcy set forth is, that Sykes, being a trader, on the 20th and 27th of January, 1870, stopped payment of his commercial paper and did not resume payment thereof

In re Sykes.

for the space of fourteen days. The paper described under the designation of "commercial paper" in the petition, is the note of Sykes for the sum of \$13,000, dated on the 21st of October, 1869, payable to his own order, *on demand*, and duly indorsed by him.

BLODGETT, J., charged the jury as follows:

It is objected on the part of the respondent that this note, not being negotiable by the law merchant, and having been given for a loan of money, and not for commodities bought or sold on the market in due course of trade and business, is not "commercial paper" within the intent and meaning of the bankrupt act. I do not think, however, that either of these objections are well taken. The phrase "commercial paper" as used in this act, seems to me to mean *negotiable paper* (that is, promissory notes or bills of exchange), *made by a banker merchant, or trader in the due course of his business as such banker, merchant, or trader*, whether the element of negotiability be given the instrument by the law merchant (or common law of merchants) or by statute. It seems to me sufficient that the paper be negotiable,—that is, transferable by indorsement or delivery. And the business of the respondent being that of a trader in produce, carried on mainly through the agency of loans of money negotiated through the banks, to be repaid by drafts drawn against shipments thus bought, such loans are made in due course of that business.

It is further objected on the part of the respondent that, although this note remains unpaid, yet he has not been guilty of an act of bankruptcy by neglecting or refusing to pay the same because he has, or has been advised by counsel that he has, a legal defense to the note—which defense he was in good faith making to an action at law brought on the note at the time this petition was filed.

And the court instructs you that if the respondent did, acting under the advice of counsel, believe, in good faith, at

In re Sykes.

the time this alleged act of bankruptcy was committed, that is, on the 20th day of January last, that he had a valid defense to this note, then his failure to pay the note was not a suspension of payment within the intent of the bankrupt act. But it must be a *bona fide* belief that he had such a defense; not a mere pretext of a defense, but some tangible and defined idea that he could, by appeal to the courts, avoid the payment of all or a part of the demand.

As I have allowed a wide range to the testimony bearing on this branch of the defense, it seems necessary that I should explain to you the direction and bearing to be given this testimony as applicable to the issue you are to pass upon.

The note in question was given for and represents a balance of overdrawn bank account between the respondent and the Fourth National Bank of this city.

It is claimed by the respondent that in September or October last he, being then engaged in this city in the business of buying and shipping produce, made a contract with the Fourth National Bank, through Mr. Maynard, its cashier, by which the bank was to advance him funds sufficient to buy and ship 1,000,000 bushels of oats, or other kinds of produce equivalent to that amount; that the bank was to pay his checks as he made purchases, and as fast as he made shipments he was to make drafts against these shipments, which were to be credited to him by the bank, the bank to have the exchange on the drafts as well as interest on the overdraft; that upon the faith of this agreement, he commenced his purchases, and had a portion of them made, when the bank dishonored his checks, thereby seriously impairing his credit, compelling him to change the destination of his shipments, and compelling him to sell at a sacrifice, which he need not have done if the bank had kept faith with him. After this occurrence, he gave the note in question, as he says, merely as a memorandum of the amount of his overdraft, and not as a settlement.

As to whether such an agreement was in fact made, there

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is a conflict of testimony; the respondent testifying to his version of it and Mr. Maynard contradicting him.

It is also insisted under the testimony, that on or about the 27th of November last, an arrangement was entered into between certain of the directors and officers of the Fourth National Bank and the Manufacturers' National Bank of this city, whereby the assets (including the note in question), business and good-will of the Fourth National Bank were all transferred to and merged in the Manufacturers' National Bank, under such circumstances as to make such transfer void and totally inoperative, and that consequently the petitioner is not the owner of the note, and has no right to present it in this or any other form.

You will bear in mind, gentlemen, that we are not trying the question of the validity of this defense, nor the extent to which it may avail the respondent, but only his sincerity in insisting upon it; and the evidence adduced, *pro* and *con*, as to the dealings and transactions between the parties, and the transfer of the assets of the Fourth National Bank, is only to be considered by you for the purpose of determining whether the respondent failed or refused to pay this note at the time alleged, because he believed, in good faith, that he had a valid defense to the whole or a part of it.

If he was advised by counsel and believed that he could set off against this note the damages which he had sustained by the failure of the Fourth National Bank to keep its contract with him, he then had the right to interpose that defense in a court of law.

So, too, in regard to petitioner's title to the note. If the respondent had been advised by counsel, that, owing to the circumstances under which the Manufacturers' National Bank obtained this note, they had no title thereto,—that they stood in the same position as a person who had stolen it, and had no right to enforce its collection; that it was still the property of the Fourth National Bank, and he was liable to them and them only thereon,—such advice, if given in good

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faith, on a fair statement of the facts, would justify a refusal to pay, and an act of bankruptcy could not be predicated upon such refusal.

Nor does the fact that the respondent made divers offers and propositions for the payment of the note or the overdraft before the note was given, necessarily conclude or shut him off from making these defenses at the time of the alleged stoppage of payment. These offers were not accepted, and besides, the respondent testifies that these offers were made under circumstances of great excitement, when his credit had been imperiled, and he was willing to sacrifice much to reinstate it.

In this connection it is proper that I allude to the position taken by counsel for the petitioner, that respondent had been guilty of acts of bankruptcy by refusing payment of this note when demanded at times prior to that alleged in the petition, but I am of opinion, and so instruct you, that the petitioner is confined to the act of bankruptcy alleged in the petition. This being a note on demand, it became due when demanded, and had the petitioners intended to avail themselves of any of the prior demands and refusals or suspensions of payment as constituting acts of bankruptcy, they should have averred or set them out in the petition, in order that the respondent might be prepared to meet them in evidence. The real question is, Did he on the 20th or 27th of January last commit an act for which he should be adjudged bankrupt? A legal defense may have occurred after the first demand, which he might have the right to set up when the last demand was made.

It is also insisted in the proof on the part of the respondent, that this is the only paper which he has failed to meet at maturity; that he had other commercial paper extant at the time of the failure to meet this note, and has paid the same promptly as it became due; that he is a man of means, and has not stopped or suspended business on account of the failure to meet this note. These facts, if established by

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the evidence, should go far toward rebutting any presumption of bankruptcy which might arise from the failure to meet the note in question, and tend to show that the failure to meet this note was not in consequence of insolvency, but from other causes not making him amenable to the bankrupt act.

It is also insisted on the part of the respondent, that the note in question is not "*commercial paper*," because the same was not given in due course of business, but merely as a memorandum to be charged up to the "Bills Receivable" of the bank, instead of remaining as an overdraft on the books, and that it was not the expectation or intention of the parties that it should be paid "on demand," or that a payment of the whole amount would be insisted upon at any time, and that a settlement of it had been a constant subject of negotiation between the parties. There is much in the evidence to justify this assumption. But as the question is a new one, I prefer to reserve it and consider it on a motion for a new trial, if the jury shall find a verdict against the respondent on the points already submitted to them.

It is admitted that prior to the commencement of these proceedings, the petitioner had instituted a suit on this note in the Superior Court of Chicago against the respondent, which suit is still pending, and in which the issues are made up so as to permit the trial of the defenses indicated. And it is insisted that the stipulation giving time to plead in that case operated as an extension upon the note as against the bankrupt act. I do not concur in this view of the matter for reasons which I will not take time to give.

But this stipulation, and the whole proceedings in the suit at law, so far as in evidence, may be considered as circumstances going to prove the fact of the good faith of the respondent in urging his defense at law to this note, and give such weight in that direction as the jury shall decide them worth.

You will then, gentlemen of the jury, only consider whether

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the evidence, taken altogether, shows, that on the 20th or 27th of January last the respondent, James W. Sykes, influenced by the advice of counsel, given upon a fair statement of the facts, did believe that he had a valid defense to the note in question and refused or neglected payment on that ground. If you are so satisfied, you will find the respondent not guilty of the acts of bankruptcy charged.

But if, on the contrary, you believe that said respondent had no such *bona fide* belief, and set up such defense merely as a pretext, and without the intent and purpose of prosecuting the same in good faith, you will find him "guilty" as charged.

Verdict and judgment for respondent.

See further, that a note given for borrowed money is commercial paper. *In re Kenyon & Fenton*, 6 Bankruptcy Register, 238, 245. See also, *In re Hollis* and *In re Kenney*, 3 do., 82.

Contra, *In re The McDermott Patent Bolt Manufacturing Co.*, 3 do., 33.

So an indorser is held as the maker of commercial paper. *In re Peter Nickodemus*, 3 do., 55, whether the note be one of accommodation or not. *In re John Clemens*, 8 do., 279, *reversed* in 9 do., 57; *In re Chandler*, 4 do., 66.

That non-payment of commercial paper to which there is a good defense, does not constitute an act of bankruptcy, consult *In re Thompson vs. McClallen*, Vol. 2 of this Series, 166, and cases there cited. Also, *In re Munn*, Vol. 3 of this Series, 442, S. C. 7 Bankruptcy Register, 468.

Consult *Unthank vs. Travelers' Ins. Co.*, Vol. 4 of this Series, 357, as to the effect of a proposition to compromise.—[Reporter.

In re Butterfield.

In re BUTTERFIELD.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MARCH,
1870.

IN BANKRUPTCY.

1. **OPPOSITION TO DISCHARGE—ALLEGATIONS MUST BE SPECIAL.**—Allegations in opposition to discharge are not sufficient when they simply follow the words of the statute. They must be as exact as the specifications in an indictment.

2. No intendment will be made in favor of the pleader. The construction is more strict than in common law proceedings.

Opposition to discharge. The specifications of opposition are in the language of the bankrupt act.

H. N. Eldridge, for opposing creditors.

James L. Stark, for bankrupt.

BLDGERTT, J.—The allegation here is that the bankrupt “has given a fraudulent preference, contrary to the provisions of the act.” This last allegation is totally inoperative ; it lacks a specification in detail, which would be necessary to enable the party to plead it in bar. The courts have decided, again and again, that these specifications must be as exact as the specifications in an indictment, and for the reason that there is no specific act of fraud alleged here, but only the general terms in the language of the statute itself, as that the party has been guilty of conveying property in violation of the act. These specifications are too general. It is not shown what property he conveyed, nor when he conveyed it, nor to whom he conveyed it, nor does it fix upon any specific act which can be identified as the act of the bankrupt upon which a jury might pass.

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The first specification is defective as failing to aver that this transfer was made to Mr. Stark with intent to defraud the bankrupt act, or that, being so, any creditor has been given a preference. There is no allegation that he intended to defraud or delay the operation of the bankrupt law. It is argumentative, and very loosely so, at that.

"Intending to give a preference" is not explicit. The authorities are very explicit, and it is stated generally in them that the specifications must be as precise as those of an indictment. I was looking over a class of cases cited here in reference to the particularity with which the specifications must be made up, and I find the principle is applied to bankruptcy proceedings with more strictness than even to common law proceedings; that no intendment will be made by the court in favor of the pleader; and as these specifications, taken together as a whole, do not show that Mr. Stark was a creditor, or that there was an intention to give a preference to a creditor, I do not think they are sufficient.

That the specifications must not be vague and general, but of facts,—distinct, precise, and specific.—see *In re R. C. Rathbone*, 1 Bankruptcy Register, 50 and 65; *In re Beardsley*, *id.*, 52; *In re Marvson*, *id.*, 115.

The strictness of common law pleading is not required. *In re Smith & Bickford*, 5 *do.*, 20.—[Reporter.

UNITED STATES vs. JAMES KENNEALLY.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—APRIL,
1870.

1. COUNTERFEIT UNITED STATES NOTES.—On an indictment for having in his possession, with intent to utter, United States treasury notes, the accused may show that he received them accidentally or in ordinary course of business.

2. GOOD CHARACTER may be shown as evidence of his intention; and absence of such evidence is a strong circumstance to show that he has no such evidence to produce.

3. WITNESSES SUMMONED BY UNITED STATES FOR ACCUSED.—PROCESS.—It is the duty of the court, on application of the prisoner, showing that he is unable to send for his witnesses, to summon them at the expense of the Government.

4. BAD CHARACTER.—The prosecution cannot give evidence as to the character of the accused unless he opens the door by introducing evidence of character himself.

5. The fact that the accused, when arrested, made no explanation of the manner in which he got the counterfeit money, nor any assertion of innocence, is a circumstance which may be considered by the jury against him.

Indictment for having in his possession, and with intent to utter and pass, certain counterfeit notes of the United States Government.

J. O. Glover, U. S. District Attorney, for the Government.

BLODGETT, J., charged the jury as follows:

The evidence in the case, on the part of the prosecution, is very short. It is simply to the point that the prisoner was arrested by the sheriff of Peoria county; that when called upon to deliver over any counterfeit money which he had in his possession, he took from his pocket the roll of bills exhibited before you, and identified as counterfeit.

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When a man is arrested with counterfeit money in his possession, knowing it to be counterfeit, he cannot establish his innocence by vague hypotheses or theories, or speculative statements in relation to his intentions and the manner in which he came by it. But he may relieve the charge thus placed upon him by proof of former character, showing that he would not be likely to be engaged in that class of business, or that he obtained the money in due course of business, supposing it to be genuine. Every man in the community, in business, is liable to receive counterfeit money. We infer that every honest man is able to show such facts in regard to his character and conduct as are sufficient to rebut any evidence of guilty intention. The absence of evidence of that character is to be taken as at least a strong circumstance to show that the person accused has no such evidence to produce.

It is the duty of the court, on the application of a prisoner, to send for witnesses, wherever they may be had, within the jurisdiction of the court, and at the expense of the United States Government, if the prisoner proves that he is poor, and unable to bear the expense himself.

The prosecution, in cases like this, are not allowed to give evidence of the general bad character of the accused unless he opens the door first by introducing evidence of character himself. It is not competent for the prosecution to show, as a make-weight in the case,—as a part of the evidence for the prosecution in making out a *prima facie* case,—that the accused is a person of bad character. The law, in its leniency, presumes every man to have a good character until the contrary is shown, but for the purpose of rebutting any presumption of guilty intention raised by circumstances not clearly explained otherwise, the law allows every person accused of crime to introduce evidence of character, which should, and always does, go far for the purpose of rebutting the presumption of criminal intent.

There are two counts in this indictment: the one, having

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them with intent to pass; the other, with intent to sell; and it is for you, with the testimony before you, to say what is the fact in the case. The testimony is in a very compact form. With reference to the defense set up, that this man Connor persuaded the defendant to accept these notes at the time, there has been a great deal said by counsel. You are all aware that there has been no testimony offered bearing on that assertion. The man was a competent witness to have been brought here on the part of the defendant. The court would have allowed a rigid and thorough examination if there was any circumstance going to show there was anything to justify a suspicion of that kind.

When arrested, the prisoner made no pretext to the officers of having obtained the money in the manner in which his counsel and he himself now allege. Honest men, arrested on a criminal charge, generally, at the first blush, state the truth in reference to the manner in which they are entrapped—if they are entrapped—into the circumstances which make against them. This matter has been commented on by counsel, and I merely call your attention to it.

If you are satisfied from the proof that the prisoner is guilty, say so. If not guilty, say so. It is no part of your province to fix the punishment. That is to be fixed by the court.

Verdict, guilty.

For authorities upon the rule stated as to admitting evidence of the character of the accused, see 3 Greenleaf on Evidence, §25, and note 4.

Consult *United States vs. Durling*, volume 4 of this Series, 509.—[Reporter.]

BRODIE SELLON vs. FIDELIA D. REED.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY,
1870.

1. **HOMESTEAD—DIVORCE.**—The Homestead Act should be liberally construed, and where a decree of divorce gave the custody of a child to the mother, and she was then in possession of the homestead, ejectment will not lie by the husband to recover it.

2. During the pendency of a bill for divorce, the husband and wife have no power to make an arrangement about the property which shall be binding, unless embodied in the decree.

This was an action of ejectment to recover the possession of lot 4, block 5, in Galva, Henry county, tried before the court without a jury.

The facts shown by the proofs are substantially these:

On and for some time after October 25, 1867, the premises in question were owned, as of an estate in fee, by Elias O. Reed, who occupied the same as his homestead, the defendant, Fidelity D. Reed, being his wife and residing with him on said premises, his family consisting of himself, wife and one child, a daughter about eleven years old.

On the 24th of September, 1868, defendant filed her bill in the Henry County Circuit Court, against said Elias O. Reed, for a divorce on the charge of adultery. The case came on for hearing at the October term, and on the 9th of October, 1868, the court made its final decree in said cause, divorcing said Fidelity D. from said Elias O. Reed, awarding her the care and custody of the child, and \$500 alimony. At the time of filing her bill, said defendant was in possession of the premises, and continues to remain in possession thereof and to occupy the same as her home. After the entry

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of said decree of divorce, said Elias O. Reed conveyed the premises to Ira C. Reed, and he conveyed the same to the plaintiff. Defendant claimed a right of possession under the homestead acts of this state, which was the only defense interposed to the title made out by the plaintiff.

BLDGERT, J.—I do not find the precise question raised by these facts to have been decided by the Supreme Court of this state, or of any other state having an analogous statute; but, following the spirit of the adjudications so far made by the courts of this state, I think the defense set up is made out by the facts. The principle of those decisions seems to be that the homestead estate is carved out of the general estate, and vested in the head of the family. The wife cannot be divested of her homestead right without a deed solemnly executed and acknowledged by her in the manner pointed out by the statute. In this case, the wife acquired her homestead right in the property, and at the time the divorce was applied for, was living thereon as her home. By the decree of divorce, she is charged with the custody and care of the child, and thus continued as the head of the family. She has done no act to divest herself of her right. It is true, the decree allows her \$500 alimony, to be paid by the husband, but there is no evidence that the court intended that in lieu of her homestead right, even if a decree would have been effective for that purpose.

In the case of *Vanzant vs. Vanzant*, 23 Illinois, 536, the Supreme Court of this state says, "The intention of this Act is manifestly to save the homestead for the family. * * * The natural death of the householder would not destroy it, nor would his civil death for crime. If this was not so, the object of the act would be defeated, and the beneficence of the Legislature of no avail. The wife was the meritorious cause of the divorce. The children composing the family were committed to her care and nurture, and have, in our judgment, an undoubted right to occupy the homestead. As a

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home, and as their home, it has never been granted away, or the right to occupy it released by any one competent to release it. The spirit and policy of the homestead act seem to demand this concession and to regard the complainant, for this purpose, as a widow and the head of a family."

It is true, that case differed from this in many material features. There the wife by her bill alleged that she furnished the money for the purchase of the homestead, and the court, by its decree, awarded it to her. But the rule laid down in that case seems manifestly to tend to the conclusion I have arrived at in this.

Proof was offered on the trial to show that before the divorce was granted, and while the bill was pending, a parol arrangement was entered into between Reed and his wife by which he agreed to pay her \$1,000,—\$500 of which was to be cash and the balance in certain notes,—he agreeing not to resist her application for divorce, and on receipt of that amount she was to give up possession of the house. This agreement or stipulation, however, was not embodied in the decree, and was undoubtedly void, the husband and wife having no power to make a contract of that nature during the coverture. I do not, therefore, deem the legal rights of the defendant affected by this arrangement or the evidence of it.

Judgment for defendant.

UNITED STATES vs. JOHN S. MILLER ET AL.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1870.

1. DISABLED DISTILLERY.—In an action on a distiller's bond, under the Act of Congress of July 20, 1868, a plea that the still blew up, of which the assessor was duly notified, whereupon he locked up and took control of the property, is a good plea as to the time the still was thus disabled.

2. If the partially manufactured material is duly turned over to the proper officers, the distiller should not be charged for spirits which he could not distil.

Action of debt on a distiller's bond, executed by defendants, dated October 3, 1868, the bond being in the usual form, in the penal sum of \$27,000, and under the act of July 20, 1868, §20.¹ Averment that Miller, the distiller, from October 6th to 31st, 1868, at Sterling, distilled a large quantity of spirits subject to tax, and returned to the assessor less than 80 per cent. of the producing capacity of the still.

Defendants pleaded that on a certain day the still blew up, of which fact the assessor was notified, whereupon he put a lock upon the furnace and fastened up the fermenting tubs, in which condition the establishment remained until October 28, when, the repairs being completed, business was resumed. It is averred that all the wines distilled were duly returned.

The Government filed a demurrer to the plea.

BLODGETT, J.—There must be an intent to distill, and if the distiller was so circumstanced as to preclude the idea that he intended to distill, I don't think he can be charged. The statute does not provide for the stoppage or suspension of

¹ 2 Brightley's Digest, 322; 15 U. S. Statutes at Large, 125.

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business by a casualty. It provides for a man's bringing his business to an end by some systematic arrangement on his part, but here is the interposition of an accident which utterly prevents him from going on. The question is, What shall be done with the partially manufactured material in the distillery? It seems to me if he gives it over to the custody of the proper officers of the Government, so that it clearly appears that the work of distilling was suspended, he should not be charged with duties on spirits he did not distill, and which, under the circumstances, he could not distill.

The demurrer is overruled.

NATIONAL BANK OF COMMERCE vs. ALFRED BOOTH.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE, 1870.

1. LIABILITY OF INDORSER.—In Illinois, the indorsee of a promissory note, the maker of which has been adjudicated bankrupt, may proceed at once against the indorser.

2. The case is not similar to that of a deceased maker of a note, where the holder must pursue the estate of the maker in the Probate Court.

Assumpsit against Alfred Booth as indorsee of a promissory note of Barnum, Mason & Co.

BLODGETT, J.—Judgment must go against the defendant in this case.

Mr. Booth is sued as the indorser of a promissory note made by the firm of Barnum, Mason & Co. He pleads that Barnum, Mason & Co. have been thrown into bankruptcy, and that their assets are in the hands of the assignee and will

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produce fifty cents on the dollar, and insists that the holders of the note can not proceed against him as indorser until they have exhausted the assets in bankruptcy.

The statute of this state provides that an indorser shall not be liable unless the holder shall have used due diligence by the institution and prosecution of a suit against the maker of a note, except under certain conditions. In this case, the institution and prosecution of a suit against Barnum, Mason & Co. is entirely impossible, they having been by the act of their creditors, declared bankrupts, adjudicated as such, and no suits on their old indebtedness could be maintained against them.

It was contended very strenuously on the part of the defendant in this case, that the case was similar to that of a deceased maker of a note; and there are some adjudications of Indiana and Kentucky to the effect that the holder of the note must first pursue the estate of the deceased in the probate court, and exhaust his remedy against the estate of the deceased in the surrogate or probate courts; but on examination, I find the statute of Illinois is broader than the statutes of Indiana and Kentucky, and it seems to convey the idea that the institution and prosecution of a suit against the maker of the note is the diligence, or kind of diligence, that is required to fix the liability of the indorser. There being no adjudicated case to sustain the position taken by counsel for defendant in this case, I am inclined to hold to the doctrine that sufficient is shown by the declaration in this case, —by the averment of the bankruptcy of the makers of the note,—to dispense with any diligence against them.

Judgment for plaintiff.

The statute referred to will be found in 1'Gross (1871), p. 461, §5. For the present statute see Revised Statutes, 1874, p. 719, §7. These provide if "such suit would have been unavailing," when brought against the maker, the indorser shall be immediately liable.—[Reporter.

The Monongahela.

THE MONONGAHELA.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1870.

IN ADMIRALTY.

1. CLAIMS OF CAPTAIN.—The contract of the captain of a vessel for his services is a personal contract, and he has no maritime lien for his compensation as such.

2. His claims for advances for board of crew and purchase of supplies may, however, be allowed out of proceeds in the registry.

BLODGETT, J.—The hearing in this case came on for the purpose of determining what disposition should be made of a balance of proceeds remaining in the registry of the court. The steamer has been sold, the claims of the libellants and some others paid in full, and there is a remnant of some five or six hundred dollars left in the registry.

The captain of the steamer filed a claim amounting to \$1,379 for wages as captain, and some small expenditures. There are also claims filed by material and supply men to the amount of about \$900. It is objected by the material and supply men that their claims should be satisfied out of these proceeds before there is any satisfaction of the captain's claim. I am clear, on consulting the authorities, that such is the case. The objection to the payment of the captain, either *pro rata*, or as a first claim out of the proceeds of this steamer, I think is well taken.

The law clearly seems to contemplate the contract by the captain for his services as a personal contract with the owner of the vessel. He can file no libel; he has no lien upon the vessel for his wages or his services, although he has a lien, perhaps, for expenditures, or materials, or

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supplies, when in a foreign port, but for his wages as captain he has no lien, cannot libel the vessel, and cannot enforce it *in rem*. If there should be a sum left in the registry after payment of all liens, I am inclined to think that the captain, being a creditor of the owner, might intervene to be paid out of this fund, not because of his lien, but because he is a creditor and entitled by proper proceedings to his payment out of any funds belonging to the owner, his debtor; but certainly he has no lien as against material and supply men, who have at least a statutory lien.

I, however, find in the account filed by the captain, that he paid \$55.50 board of crew and \$23.85 for supplies of the boat. These items being proven, he will be entitled to the amount of those items, \$79.35, or rather, to his *pro rata*, with the other claimants.

For a full discussion of the master's lien, and collection of authorities, see 2 Parsons on Shipping and Admiralty, 24-5, and notes.—[Reporter.]

Walworth vs. Board of Supervisors.

JAMES J. WALWORTH vs. BOARD OF SUPERVISORS OF COOK COUNTY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE, 1870.

IN EQUITY.

APPLICATION FOR INJUNCTION.—On filing a bill for an injunction, it is not competent for the complainant to fix a time for hearing the motion for an injunction so far ahead as to embarrass the defendant. The court will, on application, anticipate the rule day.

Rule to show cause why injunction should not issue, returnable on the 25th. Counsel for complainant contend that such is not a rule to show cause on or before the day set; that the rule day ought not to be anticipated.

BLODGETT, J.—Mr. Dent came in on Saturday and stated that notice had been served of an application for injunction under a bill filed in court; that the application would be made on the 25th of this month. He stated that the application was against the Board of Supervisors of this county, to prevent their entering into a certain contract; that the board was then in session, and likely to take action in the matter. In view of the fact that that board is a public body in charge of the county interests, it might be important for the public that they should know whether they had the right to make the contract. I thought he should have an early hearing, and so intimated to Mr. Dent that the public business should not be delayed by the mere option or motion of the party filing a bill against it, for perhaps the party filing the bill and giving the notice might set an unreasonable day. A man might file a bill and give notice that he would apply

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for an injunction in six months, and thus get the advantage of an injunction, and yet not get it. I therefore thought that Mr. Dent had a right, under the circumstances, to call the matter up at an earlier day and require you to make your application.

DRUMMOND, J.—I think it is not competent for a party to fix a time so far ahead as to embarrass a party defendant by the notice of an application for injunction, but it is the right of the party to whom notice has been given to come in and have the matter disposed of in a reasonable time.

JOHN J. WALKER, EXECUTOR, &C., ET AL., VS. WM. M.
DERBY, ET AL.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1870.

IN EQUITY.

1. ANSWER UNDER OATH PREVAILS OVER DATE OF INSTRUMENT.—Where, in a bill to set aside a conveyance on the ground of fraud by the defendants, the complainant calls for the answers of the defendants under oath as to the actual date of the execution of a contract relied upon, and the defendants answer under oath that it was not executed until a day much later than its date, the *prima facie* evidence made by the instrument itself is overcome.

2. In such case the rule applies that the answer called for under oath is, if responsive to the bill, conclusive, unless disproved by two witnesses, or by one witness and strong corroborative evidence.

8. AGENCY—WHEN TERMINATES.—The agency of a real estate agent and his duty to his principal ceases upon the delivery of the title papers and payment for the property.

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4. **AGENT MAY AFTERWARDS DEAL IN THE PROPERTY.**—After the termination of the agency the agents have the same right as any other persons to deal in the property.

5. The vendor, in order to set aside the sale, must show that such interest was acquired during the continuance of the agency. .

6. **NO DUTY AS TO DISCLOSURE.**—If they afterwards acquire an interest from the purchaser, they are under no obligations to disclose that fact to the vendor, and the fact that they do not disclose it to him is not a circumstance tending to show fraud or bad faith.

7. **LEAVING PURCHASE MONEY SECURITIES WITH AGENT DOES NOT CONTINUE THE AGENCY.**—The fact that the notes and mortgage securing the unpaid portion of the purchase money were by agreement left with the agents in escrow, to await the delivery of a quit-claim deed from other parties which the vendor had agreed to furnish, does not change the relation of the parties, nor operate to continue the agency.

8. **INADEQUACY OF CONSIDERATION—MUST BE GROSS.**—To set aside the conveyance for inadequacy of consideration the price must be so small as to strike the mind at first blush as grossly inadequate, and raise the conviction that the property was sacrificed.

9. It is not sufficient to show that certain parties might, under certain contingencies, give more on time, when one object of the vendor was to sell for cash.

10. The responsibility of the purchaser, and the negotiability in the market of the securities executed by him, may also be considered.

11. **PRESENCE OF PRINCIPAL—EFFECT.**—Where the principal was present and assisting in the negotiations the rigid rule in regard to the relations between principal and agent do not apply with full force.

12. This fact is especially important as to the question of adequacy of consideration.

13. **ALLEGATIONS IN BILL NEVER FILED, NOT EVIDENCE.**—Allegations in a bill against the purchaser prepared by counsel for such agents but never signed nor filed, are not important as evidence against them on behalf of the vendor.

14. Testimony of witnesses in regard to the value of property at an anterior date commented upon.

15. **TEST OF ADEQUACY OF CONSIDERATION—MARKET VALUE AT THE TIME.**—On the question of adequacy of consideration, its value at a subsequent date cannot be considered. The question is as to its actual market value at the time of the transaction.

This was a bill in equity by John J. Walker, executor, and others, legatees of A. F. Hopkins, late of Mobile, Alabama, deceased, against William M. Derby, S. H. Kerfoot, Isaac F. Pierson, and other grantees, to set aside a conveyance made

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by the complainant Walker to the defendant Derby in March, 1867, of 32 acres of land, near the southern limits of the city of Chicago. The land is described as follows: The east half of blocks one and six, all of blocks four and five, and lots one, two, twenty-three, and twenty-four of block twelve in Pryor & Hopkins' Subdivision of the west half of the northwest quarter of section 3, township 38, range 14, and an undivided half of twenty acres of land in the northeast corner of section 4, same township and range.

The substantial allegations of the bill were, that the real estate in question belonged, at the time of the transaction to the complainants, as executor and legatees of A. F. Hopkins, deceased; that, about the first of March, 1867, said complainant, John J. Walker, employed the defendants Kerfoot and Pierson, then doing business as real estate agents under the firm name of S. H. Kerfoot & Co., in the city of Chicago, as agents to sell said real estate, which employment the said Kerfoot and Pierson accepted; but that said Kerfoot and Pierson, disregarding their duty in that regard, and taking undue advantage of the trust and confidence reposed in them, made a corrupt agreement with Derby whereby they sold said land to Derby at a grossly inadequate price, with a corrupt and secret understanding and agreement between said Kerfoot and Pierson and Derby, that they (Kerfoot and Pierson) were to have and take one half of the said lands, at the price for which they sold the same to the said Derby, and that said Walker, being misled by the confidence he had reposed in the said Kerfoot and Pierson as agents for said complainants in that behalf, consummated and completed the sale thus fraudulently made.

Derby, Kerfoot and Pierson, and divers other persons, who had purchased portions of the land, were made defendants, and their answers called for under oath.

In their answers Kerfoot, Pierson and Derby explicitly deny the charges of corruption and fraud made in the bill, and insist that Derby was the sole purchaser of the land in

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question, without any fraud or secret agreement as charged in the bill.

Hill & Dale, for complainants.

Monroe & McKinnon, and *C. Beckwith*, for defendants.

BLODGETT, J.—The undisputed facts shown by the evidence are substantially these: That the testator, A. F. Hopkins, died in December, 1865, at Mobile, Alabama, and by his will appointed said John J. Walker and one W. G. Jones his executors. Both of said executors qualified; but Jones, on the 6th of February, 1867, resigned his executorship, leaving the said Walker sole acting executor. By the terms of the will the estate of the testator was to be divided between his wife and children, and the will empowers the executors "to sell and convey all the houses and lots of the testator in the city of Mobile, and all other lots, wherever situated, on such terms and at such times as the said executors shall deem most advantageous to the estate."

After granting this power, the testator proceeds to state: "I have the title to about 36½ acres of land at, and adjoining the City of Chicago, in the State of Illinois; but my daughter, Maria Walker, has an undivided interest in them of two acres, and my son-in-law, John J. Walker, has an undivided interest of two and one-half acres in that part of my land belonging to J. W. Pryor and myself, and for which the said Walker holds my written contract."

Said testator, Hopkins, had owned said lands since 1853. They were unimproved and unproductive. About the 1st of March, 1867, the Hopkins estate was in pressing need of money to pay debts which could no longer be postponed or delayed; and Walker, as executor, was under the necessity of selling either some improved real estate in the city of Mobile, or this property in Chicago. The firm of Rees & Kerfoot had been, from 1855 to 1860, to some extent, the agents for the owners of said lands, and in 1865 some correspondence

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in regard to the value and salability of this property had passed between Walker, and S. H. Kerfoot & Co., who, on the dissolution of the firm of Rees & Kerfoot, succeeded to the agency of this property. Walker came to Chicago about the 1st March, 1867, for the purpose of selling said lands, and placed of the business in the hands of S. H. Kerfoot & Co., his chief acquaintance being with Mr. Kerfoot. Walker wished to sell for cash, and Kerfoot advised him that he could not do so without great sacrifice, and told him that it was a bad time to sell; and that he had better wait until spring opened, and until navigation and business again revived prices. Walker then suggested that if he could make a loan of \$10,000 to meet his necessities, and secure the same on this property, he would delay selling; but Kerfoot informed him that it would be impossible to negotiate a loan on such security in this city, the land lying outside, and being unimproved. They visited the land and concluded to put it in the market at \$1,000 an acre, cash. Kerfoot stated that he knew of only one man who would be likely to make the purchase, and that was Derby the defendant. He introduced Derby to Walker, stating as his reason for making the proposition to Derby, that Derby had lately been dealing in lots in that vicinity, and had his eye on investments in the southern part of the city, and that Derby having lately sold his house and lot for \$45,000, had the means to buy if he chose to do so. Walker and Derby had much negotiating together, which finally resulted in a written agreement between them, bearing date on the 6th day of March, 1867, by which Walker, as executor of Hopkins, agreed to sell the land in question to Derby for \$25,600. \$8,200 in cash and the balance in three equal annual payments, with interest at six per cent., Walker to give a clear and perfect title.

Walker had an abstract of title prepared, which was examined by H. S. Monroe, Esq., an able lawyer in this city, on behalf of Derby, who pronounced the title satisfactory.

About this time Derby manifested some reluctance to close

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the bargain and became critical and captious in regard to the title, and finally insisted on a quit-claim deed from the legatees in addition to Walker's deed as executor, this Walker promptly agreed to furnish, and it was agreed that the notes for the deferred payment should remain in Kerfoot's hands until said quit-claim deed was duly executed and delivered. On the 19th of March the transaction was consummated by the execution and delivery to Derby of a full covenant warranty deed from Walker as executor and trustee under the last will and testament of A. F. Hopkins, and the execution to Walker as executor by Derby of the notes to be given for the deferred payments; also, a trust deed on the premises sold to secure the payment of said notes. The deed and trust deed were duly delivered, and Derby paid to Walker the cash payment of \$8,200, and the notes, as had been stipulated, were left in the hands of Kerfoot. The deed and trust deed bear date on the 16th of March, but were not delivered nor the money paid until the 19th, when the deeds were duly recorded. On the same day Kerfoot & Co. rendered to Walker their bill for services, commissions and disbursements about the sale and their agency in that behalf, the item of "commissions" being \$711. On the 30th of May, 1867, Walker delivered a quit-claim deed to Derby, and became entitled to the delivery of Derby's notes. A new arrangement was, however, entered into between Walker and Derby, by which said notes were paid in full by Derby's paying \$10,000 cash and conveying certain real estate in section thirteen, just west of the then city limits, whereupon said notes were delivered to Derby and the trust deeds duly released by the trustee. Some time in September, 1867, an agreement in writing, bearing date March 19, 1867, between the said Derby and the said Kerfoot and Pierson, was filed for record in the office of the Recorder of Cook county, whereby Derby, in consideration of \$375 in cash, agreed, in substance, to sell and convey to Kerfoot and Pierson one-half of the real estate bought of Walker, on payment of half of the money Derby had paid down

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to Walker, and the securing of one-half of the deferred payments by trust deed on said one-half, payable at the same time Derby's payments to Walker matured; said agreement to be consummated on or before the 1st of September, 1867.

It is also shown by the proofs and not denied, that a difficulty arose between the parties, Kerfoot, Pierson and Derby, in regard to the completion of this contract, and that a bill in chancery for a specific performance thereof was prepared by the solicitors of Kerfoot and Pierson, but which was in fact never filed, the matter having been compromised without suit.

So far the facts are undisputed. The complainant contends further that the price for which the land was sold was grossly inadequate and much below the price at which it could have been sold, if due exertions had been made in good faith by Kerfoot & Co., as they were in duty bound to do. Much evidence has been adduced by both parties upon this point. Indeed, the bulk of the evidence taken is upon this question of inadequacy of price, and the neglect or refusal of Kerfoot & Co. to obtain or consider offers from other persons than Derby.

There is really no disagreement between counsel in regard to the principles of law which govern this case; the only difference being as to whether the facts proven by the record make up a proper case for the applications of those principles. The rule of law governing the relations between principal and agent in regard to transactions of this character, is too well known and too familiar to require the citation of authorities. Perhaps it has nowhere been more clearly and concisely stated than in the opinion of the learned Chief Justice BREES of this state, in the case of *Kerfoot vs. Hymn*.¹ He states the rule as follows: "It is well settled that an agent employed to sell land cannot himself become the purchaser, and he is

¹ 52 Illinois, 512.

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held to the strictest fairness and integrity, and bound to act in the utmost good faith."

As I have before stated, the defendants, Kerfoot, Pierson and Derby, have each, as required in the bill, answered under oath, and all have broadly and unequivocally denied that there was any agreement between them, by which Kerfoot and Pierson were to have an interest of any kind in the land at the time the sale was made by Walker to Derby; and while they admit the agreement for the purchase of one-half of said land as set forth in the bill, they insist that the said agreement was in fact made some time after the said 19th of March, but before the 30th of May, 1867, when the quit-claim deed was made. It is insisted by the complainant that the portion of the answers setting up the time when this agreement was made is not responsive to the bill. It is true, the answers of the said defendants to the fourth specific interrogatory of the bill only admit that defendants executed an agreement of the tenor effect and date set up in the bill, but it is equally true that the charging part of the bill alleges a corrupt agreement between the parties, Derby, Kerfoot and Pierson, during the negotiation and the sale, and a sale at an inadequate price by reason thereof; and it clearly was the duty of the defendants to answer all the charging parts of the bill. Certainly, the *time* when Kerfoot and Pierson acquired an interest in the said land was the most material part of the complainants' case, as made by the charges in the bill. The position of the complainant, that the part of an answer of the defendants which states *when* the agreement was in fact made, is not responsive to the allegations of the complainants, seems to be pressing the question of irresponsiveness to a degree of nicety not justified by the authorities which have been quoted. The complainants in this case had either to prove the allegation upon which they relied for setting aside the sale complained of, by resting upon the *prima facie* evidence which the written instrument between Kerfoot and Pierson and Derby furnished, as to the time when it was

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actually executed, or to put in testimony establishing that time as a matter of fact. They have chosen to call testimony, and the testimony they have thus elected to call is that of the defendants themselves. The law is well settled by the Supreme Court of the United States in regard to the effect of an answer in chancery under oath. In the case of *Union Bank of Georgetown vs. Geary*, 5 Peters, 99, the rule was laid down, that the answer of the defendants, called for under oath, if responsive, is conclusive, unless disproved by two witnesses, or one witness and strong corroborative evidence. The same principle is also fully adopted by the same court in *Carpenter vs. Providence Washington Insurance Co.*, 4 Howard, 185; *Parker vs. Phetteplace*, 1 Wallace, 684; *Tobey vs. Leonards*, 2 Wallace, 423. In this case, the witnesses called by the complainants, namely, the defendants themselves, deny the allegations, pointedly and directly. They state explicitly, that no such agreement as is alleged was entered into by themselves at the time the sale was pending, and not until long after it was consummated, and unless such an agreement was made at the time charged, the complainants have failed to make out their case.

Having, then, failed to prove the case alleged in the bill by the evidence of the defendants themselves, it becomes incumbent upon the complainants to establish the facts alleged by two witnesses, or at least one witness and strong corroborative circumstances. The record fails to show us any witness who has testified in regard to the time when this contract was made, save the defendants, who are called upon to answer under oath, and have answered, stating that this time was long after the sale between Derby and Walker, and long after the time stated in the bill.

There is, then, left on the record, only the presumption arising from the date of the agreement, which is explained away by the answer of the defendants, and which explanation must be accepted as true, and some other circumstances of a somewhat suspicious character, which are relied upon by the com-

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plainants as establishing the facts upon which they claim to recover. These circumstances I shall allude to hereafter, but pass from them at present, to say, that I shall assume as an established fact, from the evidence, that the agreement between Kerfoot and Pierson and Derby, which bears date the 19th of March, and which is set up in the complainants' bill, as the fraudulent agreement on which they claim relief, was, in fact, made some considerable time after that date, and was so dated for convenience, as stated in the answers.

The material question, then, is, when did the employment of Kerfoot & Co., as agents of Walker, to sell this land, cease? The evidence shows, that they rendered their bill and were paid by Walker for their services on the 19th of March. What was the duty which they had undertaken to perform? Obviously, accordingly to the statements of the bill, to find a purchaser and effect a sale of the land in question. Had they not done this? They had brought Derby and Walker together. The terms of the sale had been agreed upon, the deed from Walker to Derby had been executed. Derby had made his cash payment of the purchase money to Walker, and had executed his notes and trust deed securing their payment. The trust deed had been delivered and recorded, and no act that I can think of remained to be performed by Kerfoot & Co., as real estate agents, in connection with the transaction. It is true they still held Derby's notes, which were not to be delivered to Walker until he delivered to Derby the quit-claim deed of himself and the other legatees of Hopkins; but were they, for this purpose, anything more than mere stake-holders?

It was no part of their duty or function as agents for Walker to hold his pledge that he would keep his promise and word with Derby in reference to this quit-claim deed. But much of the importance of this relation assumed by them in connection with the holding of their notes, depends, perhaps, upon the relation which the quit-claim deed bears to the title itself; and in order to fully appreciate this, it becomes neces-

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sary to review the testimony for a moment, bearing upon the capacity in which Walker was acting, and his own relations to the title to the land he was selling. It will be remembered that the will gave Walker, as executor, the most ample power to sell and convey the real estate of the testator. The bill alleges, and the testimony shows, that Walker and his wife, Maria, were each entitled to one quarter of the said Chicago land, but the evidence of their title was not then on record in the recorder's office of Cook county, and Derby and his counsel, Monroe, both testify that they had no idea of the existence of such interest at the time of the purchase.

Walker's wife was a legatee under the will, and the presumption is, that when Walker spoke of his interest in the land, he was understood to refer to the interest of his wife, under the will, rather than to the secret interest manifested by the unrecorded deed between himself and Hopkins. Pryor's evidence shows that the two acres, and the two and a half acres, alluded to in the will of Hopkins, as belonging to Walker and wife, pertained to another tract of land. I consider this fact as clearly proven, that the allusion in the will to the interest of Walker and wife in the tract of land near Chicago, is to another parcel of land purchased by Pryor and Hopkins from John Wentworth, the title to which had been forfeited. Walker testifies that it had become necessary to raise \$10,000 out of the property of the estate, to meet pressing liabilities, and he came to Chicago to sell the property, as a part of the estate. His previous correspondence with Kerfoot alluded to the property as the property of the estate. The abstract of title exhibited by him, showed the title in A. F. Hopkins, deceased, and no one else. There was no evidence of record, or in the abstract, that Walker or his wife had any interest or title in the property which Walker proposed to sell. I presume that in the negotiation with Kerfoot and Derby, Walker made the same explanation, in regard to the land alluded to in Hopkins's will, which Pryor has made in his deposition, showing and stating in that explanation, that

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the land mentioned in the will, as owned by Walker and wife, was not a part of the land that he was then selling. When Walker had agreed upon the terms of sale with Derby he signed a memorandum agreement, on the 6th of March, as the executor of the estate of Hopkins. His deed to Derby, of the 16th of March, purports to convey the entire estate, under his power as executor of the will. He took the notes for the purchase money, as executor, and that, too, in such amounts that they could not be divided conveniently between himself and wife, in their own right, and the estate of Hopkins, but took them in gross amounts, without reference, apparently, to any interest which he and his wife now claim to have had in the property, at the time of sale. Moreover, Mr. Monroe, an able and experienced real estate lawyer, in this city, passed upon the title, as shown by the abstract, and found the title, as shown by the abstract, to be in A. F. Hopkins. Could parties dealing with Walker, have supposed he was dealing in any other capacity than as executor, and that the estate for which he was executor, owned the entire property he was selling, and that the only party to be benefited by the sale, was the estate of Hopkins? It is to be borne in mind that Walker was in no need of money for his own purposes; the only pretext for selling the property was to raise money for the estate. Walker says, that he spoke to Kerfoot about the interest he and his wife had in the land, and asked if a deed from them would not be necessary, to which Kerfoot replied, that the quit-claim deed would make that all right. This was evidently at the end of the transaction, after the quit-claim deed had been agreed upon, and was not thought of or mentioned by Walker, until the deed of Walker had been prepared, and, in fact, was probably executed. In the light of these facts, I can but believe that the quit-claim deed insisted upon by Derby was a mere matter of super-caution on his part, induced, probably, by the experience of himself or others in dealing with executors and trustees, and the numerous litigated cases that have been developed in Chicago in reference to that class of interests.

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To my mind it is perfectly clear, under the evidence, that the parties all considered the title made by Walker as executor to be ample. Derby insisted upon the quit-claim deed as an act of ratification and estoppel against the legatees; and Walker, on his part, on its being suggested to him, promptly agreed to obtain it. The notes were left in Kerfoot's hands because Walker was willing to give a guarantee or pledge for the fulfillment of his promise in that regard, and because he had had some conversation in which suggestions had passed between himself and Derby, that Derby might soon be in a condition to cash the notes, or some part of them. Walker had, therefore, no occasion to take the notes away. If he expected to raise money on them, by hypothecation or otherwise, he could best do so in Chicago, where Derby was known. It was, therefore, convenient for him to leave these notes in the hands of Kerfoot as an earnest of his willingness to comply with the terms exacted by Derby.

Concluding, then, that this quit-claim deed was not deemed necessary by the parties to pass the title, I can but believe that Kerfoot and Pierson's agency terminated upon the execution and delivery of the deed from Walker as executor, and that the parties so treated and deemed it. When the agency was at an end they had the same right, as against Walker, to deal in this property as any other persons. The mere fact that they had been engaged as agents for Walker in negotiating the sale to Derby did not estop or preclude them, for all time, from making an advantageous purchase of the property. After the transaction between Walker and Derby was at an end, and their relations as agents ended, there was nothing more to be done by Kerfoot and Pierson in reference to the matter. They had found a purchaser. Walker had, by the money raised from the sale, relieved himself of the pressing necessity which brought him to Chicago. He had given a deed ample, under the power invested in him as executor, to pass the entire property, and it seems to me that there was no longer anything for Kerfoot and Pierson to do in the trans-

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action as agents for complainants in regard to the sale which they had undertaken to obtain for them. Therefore, their agency was at an end. They had fulfilled their agreement and had performed all the duty which the law would imply against them from the terms of their employment. They had been paid, which is usually accepted as the best evidence that the undertaking had terminated and the relations ended.

In disposing of this question as I have, I have, in my estimation, substantially disposed of the case, for, unless the complainants show that Kerfoot and Pierson acquired their interest in the property during the continuance of their agency, the whole fabric of the complainants' case falls; but, as much labor has been bestowed by the counsel, and much stress laid upon circumstances shown in the evidence, which they claim establish the allegations of the bill, in regard to the corrupt agreement charged against the principal defendant, I must, in justice to the counsel and to myself, take a few moments to review the testimony.

In this branch of the case the evidence as to the inadequacy of the price of the property is important mainly as a circumstance tending to show the bad faith of the agent in sacrificing his principal's property for his own purposes. I have, therefore, looked carefully over the evidence as to the point of inadequacy of price, and must say that I fail to find in the record any convincing proof of such inadequacy. It is true that some of the witnesses for the defendants placed a larger estimate upon the value of the property at the time it was sold to Derby than what it was actually sold for; but we must bear in mind that this property had no fixed market or regulated value. Its value, as stated by several of the witnesses, both for the complainants and defendants, was what is termed speculative or prospective, depending upon the growth and development of the city to which it lay contiguous, and also depending upon the fact whether that growth should be in the direction of this property. Here was a growing city. This property lay near the southern limits. It was a problem

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to be solved only by time, whether the city would expand, if at all, in the direction of this property, or whether its growth would be to the west or to the north, where there was an unlimited area. It was, therefore, a doubtful proposition whether this property would or would not advance in value. Was it not, looking at it from the standpoint of witnesses or purchasers at the time of this transaction, as much a matter of probability that it would decline in value as that it would advance? I cannot shut my eyes, nor do I think the court ought to do so, to the fact that the unimproved suburban property of the city of Chicago has, within a few years, declined to such an extent as to be almost valueless, or, at least, utterly unsalable, and then advanced within a short time so as to be in great demand at unprecedented prices.

The witnesses on the part of the complainants who testified as to the largest values are Andrews and Pryor; and in regard to these witnesses, I must be allowed to say, that I can but believe, from their testimony, that their judgment as to the value of this land in the early part of March, 1867, is largely colored by subsequent transactions, and the advance in the property, which no one at that time had any valid reason for anticipating. So, too, of several of the other witnesses on the part of the complainants, who fixed the value upon the property; and I might say, in this connection, that the value which they fixed is not so largely in excess of the price at which the property was sold as to strike the mind, at first blush, as grossly inadequate.

The rule laid down by the courts in determining this question of adequacy or inadequacy of price, is, that the price must be so small as to strike the mind, in the light of the testimony, at first blush, as grossly inadequate, and raise the conviction that the property was sacrificed in the market for a price less than its actual value. Let us review this testimony for a moment. Andrews says that he would have paid \$1,000 an acre, and perhaps \$1,200 an acre, for that portion of the land lying east of State street, and Pryor fixes the

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value of the land in the light of his subsequent inquiries in April, and some correspondence which he had in February, at \$1,500 per acre. Pryor, however, between April and June, according to his own testimony, sold his own land, in the same subdivision, at less than \$1,200 per acre; and Andrews, while he says that he would have purchased that portion which lies east of State street for \$1,000 per acre, and perhaps would have gone higher, at the same time admits that his ability to purchase depended upon whether he should succeed in enlisting a relative of his in the venture. So that the testimony of these witnesses—and they are the only ones whose testimony is relied upon strenuously on the part of the complainants—fails to show that they, if they had had the money, would have paid much, if anything, over \$1,000 for the portion of the land lying east of State street; and all the testimony concurs in establishing the fact, that the land lying west of State street, being an undivided interest, and being in a less desirable locality, would have brought a much lower price in the market. It will be borne in mind that this land sold for about \$875 an acre in gross, including the streets.

Now, we must also bear in mind that Walker was here for the purpose of raising money to meet the liabilities of the Hopkins estate; that it was desirable for this purpose not only that he should sell the land for a good price, the highest he could obtain in the market, but that he should also sell it to a purchaser whose paper would have a marketable value here or wherever he should have occasion to raise money; and I think, in view of the fact that Derby was shown to be a man of large wealth in this community, Walker would naturally have considered him a desirable purchaser, and justify himself for deducting \$100 or \$150 per acre from a speculative price.

In the light of all these circumstances, taking complainant's testimony alone, it seems to me that the proof does not show any such gross inadequacy of price as to raise the presumption of unfair dealing. But to meet this testimony on

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the part of the complainant, the defendants introduce the testimony of six witnesses, all of whom are well known to the court, and in whose safe, cautious business habits and judgments the court has much confidence. All of them testify, substantially, that this property was not worth in the market any more than Derby paid.

In connection with this testimony, I will also allude to the fact that Walker was himself present and negotiating this sale, and I doubt whether the rigid rule in regard to the relations between agents and principal should apply with its full force to a case where the principal is on the ground and has an opportunity to understand the situation for himself. It is true that this furnishes no reason why Kerfoot should enter into a corrupt and secret agreement with Derby by which they should acquire an interest in the property unknown to Walker, and while acting as his agent; but upon the adequacy or inadequacy of price as a circumstance tending to prove this secret agreement or establish this theory on the part of the complainant, it seems to me a pregnant fact, because, Walker being here, and having the means of making inquiries touching the value of this property, must be presumed to have acted as much upon his own judgment as upon that of Kerfoot, in regard to whether it was best for him to make the sale of this property at the price which Derby was willing to buy it for, or forego the sale and make provision for the necessities of the estate out of Mobile property. He was to be the judge. He did not rely upon Kerfoot and Pierson in regard to the expediency of selling at the price which Derby offered. He could have repudiated Derby's offer and refused to sell the property at the price offered. He was not obliged to accept the proposition unless his judgment so dictated.

In connection with the same class of testimony, I must also consider the fact that it is alleged in the bill, and there is some proof in the record to show, that Kerfoot did not communicate to Walker all the offers which had been made to

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him. It is alleged that Andrews had made an offer for the purchase of this property, and that Kerfoot did not communicate that to Walker. In reference to the testimony in regard to Andrews' offer, it will be borne in mind that Walker was anxious to sell for cash; that Andrews left the city upon a problematical and doubtful suggestion that he would purchase, or might purchase, if he could get a relative of his interested with him, thereby clearly conveying the idea to Kerfoot's mind that his purchase, or ability to purchase, was contingent upon what should transpire when he should be able to see the person from whom he expected to raise money; and I can but look upon the testimony of Andrews, in that regard, given at this late day, as to his intentions and purposes at that time, as being given more in the light of his judgment, in looking backwards from the present, rather than in looking forward from the time when the land was sold.

Andrews had made some investments in the locality of this property. He says that he was desirous of purchasing it, but the evidence shows that there was an area of many thousand acres of land adjoining and contiguous to the southern limits of this city, all in the market, all speculative property, all having only a prospective value, and the mere fact that twenty or thirty acres of this land was purchased by some one else in the absence of Andrews, when there were other tracts that he could have purchased for the same price, or even at a lower price, does not, of itself, seem to me to prove that Andrews would necessarily, if he had succeeded in interesting his relative and returned to Chicago, have purchased it at any higher price than Derby did, when he found himself brought in contact with Walker, or became possessed of the information that Walker was under the necessity of selling and was determined to sell at some price or other.

But it is alleged, also, as another circumstance tending to show this fraudulent combination on the part of these parties, that Kerfoot and Pierson's interest in the property was con-

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cealed from Walker. The force of this circumstance falls to the ground as testimony, when I have disposed of the main facts in the case, that this purchase was not made until the termination of Kerfoot and Pierson's agency in the transaction. If they had the right to make the purchase, they were then under no obligation to expose their transactions in a business matter to Walker or any other person. They had the right, if they saw fit to do so, to keep it concealed, although there is no evidence, to my mind, of any concealment other than what other business men would have made under similar circumstances.

It is again claimed that the bill that was prepared by Kerfoot and Pierson cuts an important figure as evidence, and that the statements in that bill are conclusive evidence as admissions of parties to show that this secret agreement existed between Derby and Kerfoot from the inception of the negotiations with Derby, and the complainant's counsel have seized upon the allegations in that bill, that "*there was a verbal agreement which was subsequently, on the 19th of March, reduced to writing,*" as unanswerable evidence in support of this case. It was admitted on the trial, and also appears in evidence, that this bill was never filed; that differences arose between the parties, and the matter was placed in the hands of counsel by Pierson, and the bill drawn. It never was signed by Kerfoot or Pierson, and, in fact, Kerfoot was not in the United States at the time the bill was drawn. It was made in antagonism to Derby's interest, for the purpose of making out a case against him. And the bill is evidently, as against Pierson, nothing but the work of counsel, without ever having been revised or corrected, or especially adopted by the complainants therein, or either of them. I therefore attach no importance to this bill as a matter of evidence in this case.

It is true there are some circumstances in the case which might go far to raise suspicions in the minds of the complainants that the dealings with them had not been entirely frank.

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The date of the agreement, and the fact that the information came to Walker from Pryor, and perhaps from other interested parties, shortly after the sale, that he had not been fairly dealt with, were calculated to raise a suspicion in the mind of Walker; but where is there upon the record any conclusive and tangible proof of which the mind of the court can take hold, as satisfactorily establishing the main allegations in this bill, as against the presumptions of innocence which the law raises in favor of parties thus charged, and their denial under oath of the charges against them. So far as the present price of this property and its rise in value or price after the sale are concerned, they are circumstances which can have and should have no weight with the court. It is a part of the history of this city, and the court cannot close its eyes to the fact that there were extraordinary rises in real estate in and about the city between the 1st of March, 1867, and October, 1868, and it is undoubtedly true that this property partook of that advance, so as to increase fivefold, if not more, in that interval. But the main question really is, Was this property sold for less than its market value at the time of the transaction between Walker and Derby, and was it so sold at the corrupt instance of Kerfoot and Pierson?

In view of all the proof in the record, I am compelled to say that there is not sufficient evidence to satisfy my mind that it was at that time worth any considerable sum more than the \$875 which Walker realized per acre for it. It is true, some witnesses say that they might have paid \$1,000 or \$1,200 an acre; but is it to be presumed that if these witnesses had been brought in contact with Walker, and found that Walker was determined to sell, they would have paid him more than Derby did? If we are to disturb real estate transactions of this city, because of unprecedented and unparalleled advances in price immediately after the sale, there is hardly a title here that could withstand the test of a judicial investigation.

Lee vs. Bowen.

In view, then, of all these considerations, I shall find for the defendants and dismiss the bill.

This case was carried by appeal to the Supreme Court, and the decision of the court below affirmed by a divided court, at the December term, 1871, no opinion consequently being filed—[*Reporter*.]

LEE vs. BOWEN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY, 1870.

IN EQUITY.

RIGHTS OF HOLDER OF BILL OF LADING.—The *bona fide* holder of a draft drawn against goods shipped, with bill of lading assigned, has a lien upon the goods in the hands of the consignee, and can recover from him the proceeds of their sale, even though the consignor be indebted to the consignee on general account.

Bill for an accounting and to recover of defendants the proceeds of goods consigned to them, the bill of lading for which had been assigned to complainant by the consignor as security for his draft drawn against the goods shipped.

BLODGETT, J.—In the fall of 1865, King & Pennock were manufacturers of cotton goods at Pittsburgh, Penn., and Bowen Bros., wholesale merchants in this city, acting as factors for King & Pennock. Owing to a decline in values and other embarrassments, King & Pennock became unable

Lee vs. Bowen.

to go on with their business without assistance, and, in order to prevent their stopping, Bowen Bros. agreed to advance their drafts or acceptances to them, to be paid in manufactured goods, which were to be shipped from Pittsburg to Bowen Bros. as fast as manufactured, to meet such acceptances. In pursuance of this arrangement, Bowen Bros., between December, 1865 and the 1st of April, 1868, advanced and paid, for account of King & Pennock, about \$25,000. The goods which it was expected would have met those acceptances had been shipped to Bowen Bros., of Chicago; but, owing to a decline in values during the winter and spring, there was a balance due Bowen Bros. of nearly \$8,000 on general account. Under this state of facts, King & Pennock, on the 11th of April, 1866, shipped by the Pittsburgh & Ft. Wayne R. R., to Bowen Bros., at Chicago, six bales of sheeting, and simultaneously with this shipment drew their draft, payable to their own order, for \$1,030, which they negotiated to plaintiff, transferring to him, also, as security for the payment of the draft, the shipping bill of said six bales of sheeting. At the same time they advised Bowen Bros., by letter, of the shipment and of the draft. The shipment was received in due course of business, and also the letter advising Bowen Bros. of the draft and the disposition to be made of the shipment. The draft was duly presented for acceptance and protested for non-acceptance. Bowen Bros., when the goods came to hand, sold them and passed the proceeds to the credit of King & Pennock, on general account. They refusing to pay the draft, complainant files this bill to compel Bowen Bros. to account to him for the proceeds of the goods.

I think the complainant acquired a lien upon the goods by the transfer to him of the shipping bill as attendant upon the draft which had been negotiated to him, and that Bowen Bros. had no right to apply the proceeds of the goods to the payment or liquidation of their general balance. The authorities all concur that a consignor may create a lien of this

Severance vs. Continental Insurance Co.

kind, and that the consignees have no right to disregard it. The rule seems to me a salutary one, and one, in fact, without which the commercial business of the country could hardly be transacted. The crops of the West could scarcely be moved if this well-established business rule were now to be overturned, as every man at all familiar with affairs knows that the usual course of shipments and business transactions of this country is, that banks make advances on drafts drawn upon bills of lading or shipping bills of essentially the character of the one before us.

Decree for complainant for the value of the goods.

In support of the text, consult *The Bank of Rochester vs. Jones*, 4 New York, 49.—[Reporter.

JOSHUA S. SEVERANCE vs. CONTINENTAL INSURANCE COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT ON ILLINOIS.—JULY, 1870.

IN EQUITY.

1. **LOCALITY OF PROPERTY INSURED.**—Locality is an important element in an insurance policy; and when the location of the property is specified, the risk cannot be extended so as to cover it, if, in fact, it is situated in an adjoining building. This is true, though the insurer supposed that the property was in the building described; and the policy cannot be reformed on the ground of mistake.

2. Though it appear that the same agents would have taken the risk with equal readiness in either building, though perhaps in a different company, this fact cannot change the contract actually entered into.

This was a bill in equity to reform a policy of insurance, and for general relief.

Severance vs. Continental Insurance Co.

The complainant having purchased, on February 25, 1865, of Pollard & Doane, a quantity of tobacco, but not wishing to use it immediately, made arrangements to store it with them, and took from them a warehouse receipt in the ordinary form, setting forth that it was stored at their warehouse, Nos. 189 and 191 South Water street, Chicago.

Wishing to obtain insurance upon this tobacco so stored, Severance took the receipt of Pollard & Doane to the insurance agency of Messrs. B. W. Phillips & Co., of Chicago, who at that time were agents for the Continental Insurance Company, the present defendant, having other companies represented by them, who issued their policy in due form upon the tobacco, B. W. Phillips & Co., as agents of the Continental Insurance Company, giving the plaintiff the following certificate:

"This is to certify that the Continental Insurance Company has insured against loss by fire, under open policy 100, by indorsement thereon on this date, in the sum of \$1,800, fifty caddies of tobacco and fifty boxes of plug tobacco, in 189 and 191 South Water street."

This policy was extended after the expiration of its first term for a further term of three months, and during the second term of insurance, the same description being given in both certificates, the buildings Nos. 183, 185 and 187 South Water street were destroyed by fire. It appears from the evidence that Pollard & Doane occupied the entire portion of 189 and 191, as a wholesale grocery store, and also a portion of 185 and 187 above the first floors, and that in point of fact, the tobacco in question was never in the buildings 189 and 191, but was, from the time of the sale thereof to Severance, up to the time of its destruction by fire, stored in the upper room of 187 South Water street. The insurance company refused to pay the loss, on the ground that the insurance was on property situated in 189 and 191, while, in fact, the tobacco which the complainant had bought of Pollard & Doane, was stored in 187 and was burned there.

Severance vs. Continental Insurance Co.

BLODGETT, J.—It is claimed on the part of the complainant that there was a mistake—a mutual mistake—between the parties in reference to the locality of this tobacco, and this bill is brought to reform that mistake and compel the insurance company to pay for the loss sustained by the complainant by the destruction of the tobacco which they supposed they had insured. There is no evidence that the insurance company at any time supposed that this tobacco was in 187 at the time they described it as being in 189 and 191, nor is there any evidence that there was any mistake on the part of the insurance company in reference to the locality of the tobacco. It is true, that according to the evidence, the tobacco was in 189 and 191, but it is equally true that to hold that the insurance company would have insured if they had known it was in 187 the same as in 189 and 191, would be virtually to compel them to make a new contract, instead of reforming one which they actually did make. Indeed, there is evidence in the case going to show that the agent of the defendant would not have taken a risk in this company, the Continental, upon this tobacco if he had known it was in 187, because the company was already carrying as large an amount of risk on property in that building as the rules of the company allowed, although he would probably have insured the tobacco with some other company; but because he would have made an insurance with some other company it does not follow he would have made one with the Continental, nor does it follow because the Continental, by its agent, was willing to insure in 189 and 191, they were therefore willing to insure in 187. Locality is an important matter in taking risks upon property, and if the courts can be allowed to say that property described as in one locality in a policy of insurance may, in point of fact, be elsewhere, fifty or a hundred feet away from that locality, it may with equal propriety be a mile away and still be covered by that policy. In other words, there would be no security for insurance companies if you were to spread their liabilities over an indefinite territory

Smith vs. Tuttle.

when the company supposed it confined to a particular locality.

I am therefore of opinion clearly, that the relief cannot be granted, that there was no mistake on the part of the insurance company that can be reformed by a court of equity.

The bill will be dismissed.

SMITH vs. TUTTLE.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1870.

JURISDICTION.

The acts of Congress confer no jurisdiction over a defendant who is served with process while temporarily in a district in which he does not reside. The defendant has the privilege of litigating in the federal court in the state of his residence.

Demurrer to a plea to the jurisdiction.

The plea sets up that the defendant, at the time of being served with process in this case, was a citizen and resident of the state of Iowa, and was temporarily in this district, and that the plaintiff is a citizen of New York. The plaintiff interposed a demurrer to this plea, on the ground that the act giving jurisdiction to the circuit courts confers jurisdiction on the court wherever the defendant might be found within the jurisdiction, although he may not be a resident of the district nor of the state.

Wetmore vs. Laird.

BLODGETT, J.—This matter was called up during Judge Davis' visit to this city and the authorities examined, and Judge Davis, Judge Drummond, and myself all came to the conclusion, in the light of the authorities, that this court has no jurisdiction over a citizen of another state who is temporarily found here long enough to be served with process; that the acts of Congress conferring jurisdiction do not contemplate that a defendant shall be sued out of the state where he resides; that he has the privilege of litigating a question in the federal courts between himself and a citizen of another state in the state of his own residence.

The demurrer will therefore be overruled.

That suitors within the jurisdiction of the court cannot be served with process, see *Juneau Bank vs. McSpedan*, ante p. 64.—[Reporter.

WETMORE vs. LAIRD.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1870.

ACKNOWLEDGMENT—NOTARY'S SEAL.

1. Nothing will be presumed in favor of a notary's certificate of acknowledgment. He must state all the facts necessary to show a valid official act, and that he has affixed his notarial or official seal.
2. A certificate which fails to show that the seal affixed is his notarial or official seal, is insufficient.

This was an action of ejectment which was tried before a jury at the May term, and verdict found for the plaintiff.

Motion for new trial was interposed on the part of the defendant and two errors assigned:

First, That the court erred in admitting in evidence on the

Wetmore vs. Laird.

part of the plaintiff a certified copy of a deed from Julius O. Harris to Nathan D. Elston. The objection made to that deed was, that there is no seal to the notary public's certificate of acknowledgment. The attesting clause to the notary's certificate simply reads as follows: "Witness my hand and seal this day," etc.; and the certified copy contains merely a scrawl. The defendant claimed that the deed must show affirmatively that the notary public has a seal and that he has affixed his notarial seal to the certificate.

BLODGETT, J.—Plaintiff contended that when a notary public says, "Witness my hand and seal," he means his notarial seal. But after an examination of the authorities touching this question, I have come to the conclusion that nothing should be presumed, in favor of a notary public's certificate of acknowledgment to a deed of conveyance; he must state all the facts necessary to show a valid official act on his part, and, inasmuch as the statute expressly provides that a notary public must authenticate his certificate of acknowledgment to a deed by his notarial seal, it seems clear to me that the certificate itself must expressly affirm and show that he has so authenticated it; in other words, he must state he has affixed his official or notarial seal; and it must appear from the inspection of the original paper that there is such a seal affixed to the deed. In this case, inasmuch as only a certified copy was used, and as the recorder has probably not made a *fac simile* of that seal on the record book of the deed, we are of course in the dark as to just what the original deed did express on its face. It may have had merely a scrawl; it may have had a regularly cut, engraved or stamped seal of the notary public; but, be that as it may, I do not think you are to stand by the seal alone. I think you must have also the certificate of the officer that what purports to be his seal is his official seal. Inasmuch as this deed is wholly barren of any statement of this kind, and fails to show affirmatively that the seal affixed to the instrument is his notarial or official seal, I think it was erroneously received in evidence by the court.

The Clayton.

As this was one of the material deeds making out the plaintiff's chain of testimony, without which he was unable to attain title, *prima facie*, to himself, of the property, it is sufficient to dispose of this motion for a new trial.

The other error assigned, the refusal on the part of the court to receive in evidence the auditor's deed, which was offered as proving a connected title under the limitation law of 1835, I do not deem it necessary to pass upon.

New trial granted.

Consult *Booth vs. Cook*, 20 Illinois, 129.—[Reporter.]

THE CLAYTON.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1870.

IN ADMIRALTY.

LIEN FOR WAGES.—Seamen have a lien on the freight and cargo for their wages, and where the charterer of the vessel is also the owner and consignee of the freight, the lien nevertheless attaches, and the freight will be the amount which the transportation was fairly worth.

This was a libel filed by the mates and crew of the bark Clayton against the freight and cargo of said vessel, on a voyage from Chicago to Collingwood and return, for their wages as seamen in the management of the bark.

BLODGETT, J.—The evidence discloses this state of facts.

The Clayton.

One Samuel D. Clark was the manager of the bark Clayton, under a charter party from her owner for the year 1867; was engaged in the lumber business in this city, and was running this bark between his mills and places where he procured his lumber and the lumber yard in this city, for the purpose of transporting lumber and timber. In the month of June, 1867, said bark started upon a voyage, with the libellants on board, from Chicago to Collingwood after a load of timber, and returned in due course of the voyage to this port with a cargo of pine timber consigned to S. D. Clark, the charterer of the bark and the owner of the cargo. Between the time this voyage was undertaken and the time of its accomplishment, Clark became embarrassed in his circumstances and made an assignment for the benefit of his creditors to C. M. Smith, and on the arrival of the bark with her cargo in this city, Smith, as the assignee of Clark, took possession of the cargo, the captain notifying Smith, at the time the cargo was unloaded, that he claimed his lien upon the cargo for the freight and seamen's wages.

In point of fact, there was no technical freight earned in this case, the consignment being made by the owner to the owner. The shipment being for the benefit of the owner at this place, the assignee Smith taking possession of the cargo, he stepped directly into the shoes of the original consignee, Clark.

I think the authorities are clear that the crew of a vessel engaged upon the navigable waters of the United States have a lien for their wages upon the freight earned. As to whether that lien extends over and attaches to the cargo or not, I do not deem it necessary to decide in this case, but I have no doubt but they have a lien upon the vessel and upon the freight. In this case, the freight would be, although there were no freight bills made out as such, what it was fairly worth to bring the cargo from the place of shipment to the place of destination. There was no contract as to what the freight should be, because Clark was consignor and cor-

The Clayton.

signee both. He owned the cargo and had a season charter for the vessel, and was freighting the cargo here to be sold in due course of business by himself; but it does not follow that because he was thus engaged in transporting property from the place of shipment to the place of destination, to be sold, that no freight is earned in the sense of our maritime law, because he did not collect freight at the end of the voyage, but simply took the enhanced value of the cargo at this point as the advantage which he received by the shipment. I think, as between himself and the seamen employed upon his vessel, the freight earned is a fair *quantum meruit* for the transportation of the cargo from the place of shipment to the place of destination, and that the seamen have a lien upon that freight for the amount of their wages.

I shall therefore order a reference to the Commissioner for the purpose of taking proofs as to what the freight of this vessel would fairly amount to on this cargo, and on the coming in of that report shall decree as against the freight earned the payment of the amount of the wages, not against the cargo specifically, but as against the freight earned. I am not disposed to discuss the question of the liability of the cargo, for I understand that the freight earned will be sufficient to pay the amount due to these men.

Sawyer vs. Aultman & Taylor M'f'g Co.

SAWYER vs. AULTMAN & TAYLOR M'F'G CO.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY, 1870.

1. Witness fees cannot be taxed in the federal courts unless the witness has been regularly subpoenaed.

2. It is not sufficient that they attended at the request of the party. The act of Congress evidently contemplated some process of the court.

This case was tried by a jury at the May term of the court, and plaintiff came in with an affidavit and asked to have the costs of his witnesses taxed, although his witnesses were not subpoenaed.

BLODGETT, J.—There has been a rule in existence in this court since some time about 1842, prohibiting the clerk from taxing the costs of any witnesses except such as were regularly subpoenaed. The witnesses in this case were not subpoenaed, but attended and testified at the request of the plaintiff; and counsel of plaintiff, I presume, acting as is the practice in the state courts, now claim to have their costs taxed as witness fees. On consultation with Judge Drummond, we are not disposed to change the rule which has been standing so long in this court, and so long acquiesced in that counsel should by this time understand it. We are satisfied that more mischief would result from a change of the rule than by strictly adhering to it; and, more than all that, I am somewhat in doubt whether the court has any right to tax costs for witnesses not regularly subpoenaed. By act of Congress, provision for compensation for witnesses reads, "for each day's attendance in court, or before any officer pursuant to

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law, each witness shall," etc.¹ Now no person can be said to be in attendance before the court pursuant to law unless duly subpoenaed.

Then, again, another paragraph in the same act commences: "When a witness is subpoenaed in more than one cause," etc.; thereby clearly conveying the idea that the only case in which witnesses can draw their compensation is when they are acting in pursuance of a subpoena. This being the act of Congress, and the rule being in consonance with the act of Congress, we are disposed to adhere strictly to it.

Motion overruled.

GEORGE W. ROGERS vs. LAFAYETTE M. WELLER.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1870.

1. ILLEGITIMATE CHILDREN—RULE OF DESCENT.—The term "children," as used in the Illinois Statute of Wills, concerning illegitimates, is used in the sense of offspring of the mother, and is not confined to children born in lawful wedlock.

2. In case of the death of one of two illegitimate children, unmarried and without issue, the mother being also dead, his property descends to the brother. He takes one-half of the estate as brother of the deceased; the other half as heir-at-law of the mother.

3. "Next of kin to the mother," in this statute, includes illegitimate, as well as legitimate, children.

Action of ejectment submitted to the court for trial upon the following facts as agreed upon by the parties.

¹ 10 U. S. Statutes at Large, 167.

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Theodore Rogers died intestate and without issue seized of the premises in question. He was the illegitimate son of Maria Purcell, who had also another illegitimate son, the plaintiff in this case. Maria Purcell died about 1840. Theodore Rogers died in 1869, unmarried and without issue. The plaintiff, George W. Rogers, the brother of Theodore, deceased, brings this suit to recover the property in question as heir-at-law of Theodore, his illegitimate brother.

H. S. Monroe, for plaintiff.

H. B. Hurd, for defendant.

BLDGERT, J.—The whole question turns upon the construction to be given to the statute of this state governing the descent of the property of illegitimates.

By the statute of 1853, which is incorporated in Gross' Statutes, 1 Vol., p. 807, as the 66th Section of the Statute of Wills, it is provided:

That the rule of descent of all property, of whatsoever kind or nature, real or personal, of any bastard or illegitimate person dying intestate in this state, or leaving property and effects therein, shall be as follows, *to wit*: On the death of any such person intestate, his or her property, estate and effects shall descend to and vest in the widow, or surviving husband and children, as the property and effects of other persons in like cases. In case of the death of any such illegitimate person, leaving no children or descendant of a child or children, then the whole property and estate rights, credits and effects shall descend to and vest in the widow or surviving husband. In case of the death of any such illegitimate person, leaving no widow, surviving husband or descendants, then the property and estate of such person shall descend to and vest in the mother and her children and their descendants, to the mother one-half, and the other half to be equally divided between her children and their descendants, the descendants of a child taking the share of their deceased parent or ancestor. In case of the death of any such illegitimate person, leaving no heirs as above provided, then the property and effects, of whatsoever kind or nature, shall pass to and vest in the next of kin to the mother of such illegitimate person, in the same manner as the estate of a legitimate person would, by the laws now in force, pass to the next of kin."

¹ Act approved Feb. 12, 1853.

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As Theodore Rogers was unmarried and had no issue, the case is not provided for in either the first or second contingency mentioned in the statute; that is to say, there is no widow or children of the deceased to take his property.

The plaintiff in this case, George W. Rogers, is a child of Maria Purcell, mother of the deceased Theodore Rogers, and the question is, Does he come within the description of persons named in the third clause of the statute as being entitled to receive one-half of the estate, the other half going to the mother?

The law uses the term "children" or "child," and it is contended on the part of the defendant, that the term is here used in its strict legal significance, that it means children born in wedlock, or legitimate children of the mother; that the term does not mean "offspring." But I am inclined to the opinion, and for the purposes of this case shall hold, that the term is there used in its proper signification, and means the offspring of the mother; that whether legitimate or illegitimate, as the case may be, in case of an illegitimate son dying intestate and without issue, or persons authorized to inherit, as set out in either of the two clauses first under consideration, the mother takes one-half of the property and her children or offspring, whether legitimate or illegitimate, take the other half. This, then, would make George W. the heir of one-half of this property, while his mother took the other half by descent.

The mother, it will be remembered, died thirty years ago, and the question is, What is the law of descent of the half which under the clause under consideration would go to the mother?

The last clause of the section is this: "In case of the death of any such illegitimate person, leaving no heirs as above provided, then the property and effects, of whatsoever kind or nature, shall pass to and vest in the next of kin to the mother of such illegitimate person, in the same manner as the estate of a legitimate person would by the laws now in force pass to the

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next of kin." And this raises the question, Who are the next of kin to this mother who bore these two illegitimate sons? Does the plaintiff in this suit, George W. Rogers, her living illegitimate son, come within the denomination as next of kin under this statute?

The term is one which has been borrowed from the civil law and incorporated into the statutes of this state, as I think, rather than from the common law. Although it is a term used in the common law, yet I think that the legislators of this state in using the term "next of kin" have used it in such connection as to rather sustain the idea that they intended to use it in the signification of the civil law, which meant, of course, all persons, legitimate or otherwise, of the same blood.

But the question receives much light, in my estimation, from the statutes in this state, which have been in force for many years prior to the enactment of the section which has been under consideration. By the 53rd Section of the Statute of Wills of the Revised Statutes of 1845, it is provided, "if any single or unmarried woman, having estate, either real or personal, in her own right, shall hereafter die, leaving one or more children, deemed in law illegitimate, such child or children shall not, on that account be disinherited; but they and each of them, and their descendants, shall be deemed able and capable in law to take and inherit the estate of their deceased mother, in equal parts among them, to the exclusion of all other persons: *Provided*, That if there shall be no such child or children, or their descendants, then, and in such case the estate of the intestate shall be governed by the rules of descent, as in other cases where illegitimates are excluded."

The effect of this statute is to give to the illegitimate children of the mother inheritable blood. So far as our state is concerned, they are vested by the operation of this statute with the qualities of inheritance; they can receive from the mother by descent and take real estate and other property to the same extent as legitimate children, and taken in connection with the subsequent statute of 1853, which has first been

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discussed, it seems to me that the better interpretation is that the term "next of kin," used in the last clause of the act of 1853, includes the illegitimate children, if such exist, of the mother, where the mother is heir.

It is true that the Supreme Court of the United States, in the case of *McCool vs. Smith*, 1 Black, 459, has held in a case going up from this state that in ascertaining who is the next of kin, under the statute of Illinois, the computation must be made according to the rules of the common law; but in this case, that question was decided more upon the consideration of the question of whether the case came within the purview of the statute of 1845, than upon the application of the act of 1853 as the rule in that case. The case was really disposed of upon the consideration of the court that it was not covered by the act of 1845, but must be disposed of upon the rules of the common law prior to any legislation being had on the subject matter in this state.

In taking this view of the case, we do not intend by any means to deny the authority of the case in Black, or to decide contrary to it, but simply to say that this case coming clearly within the acts of 1845 and 1853, it seems clear that the term "children" used in the third clause of the act of 1853, means and includes the illegitimate children of the mother, and that the term "next of kin" used in the last clause, "next of kin of the mother," etc., includes her illegitimate as well as her legitimate children, if she have any; that, taken together, the acts of 1845 and 1853, when construed in the light of the cases which have been cited, and the known principles of interpretation of statutes, clearly give George W. Rogers the entire estate of the deceased illegitimate brother. The question is not without its difficulties, and we do not feel sure that our view of the question will be entirely affirmed by the Supreme Court of the United States, but at the same time it seems to us to be the better interpretation of what the legislature of this state had intended to do by the several acts under consideration.

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I shall therefore find for the plaintiff to the extent of the entire estate, holding that he is the owner in fee of the entire property.

The defendant having taken a new trial under the statute, the case was again tried before Mr. Justice Davis, with the same result. The records having been destroyed by the Chicago fire of October 8 and 9, 1871, a trial was again had before Judge Drummond, who also found for the plaintiff. This case is now pending in the Supreme Court of the United States, on writ of error.

Pending this litigation, a suit was brought against Weller in the Circuit Court of Cook county by Eliza Smellgon and Anna Williams, collateral relatives of Maria Purcell, and the decision of the Supreme Court, on appeal, recognizes the same rule as that above laid down by Judge Blodgett.—[*Reporter*.

The Louis Dole.

THE LOUIS DOLE.

**DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1870.**

IN ADMIRALTY.

1. **DUTY OF APPROACHING TUGS.**—Where tugs are approaching on converging lines, and one gives the signal to pass a-larboard, to which the other answers that she means to pass a-port, and the first repeats her signal, the first has not the right to presume from a failure to answer her second signal that the other has yielded her course, but should proceed cautiously, and not run across the lines of the other. She must take notice of the fact that there is danger of a collision, even though the other tug may be in the wrong place and on the wrong course.

2. **WHERE RIVER BEGINS.**—The rules of river navigation apply with full force on the Chicago river to the extremity of the pier.

3. **RULE OF THE RIVER.**—Outgoing tugs should keep south of the center of the channel, and incoming tugs to the north of it. A tug going out along the North Pier is in the wrong place, and chargeable with the consequences.

Libel for damages caused by collision. The facts fully appear in the opinion.

BLODGETT, J.—I have very carefully considered the testimony in this case.

The libel in this case alleges that the tug Evans, on the night of the 7th of July, 1869, was coming into the Chicago harbor, having been out on the lake with a tow, and when about midway of the North Pier, east from the slip or outer harbor on the north side, she came in collision with the tug Louis Dole; that the Evans was guilty of no negligence on her part; that the collision was caused solely through mismanagement on the part of the officers and crew of the Dole,

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whereby a large amount of damage was sustained by the Evans, for which the libel is brought.

The evidence in the case is substantially this: On the evening in question, the Evans had been out into the lake with a tow, had rounded to and was coming up the harbor. The tug Louis Dole passed through the draw of Rush street bridge and went down the harbor, keeping close along the North Pier, and when near the west end of the extension she heard a signal from the Evans, one blast of the whistle, indicating the fact that the Evans had discovered the Dole and wished to pass on the starboard side of the Dole coming up. The Dole responded to this signal from the Evans by a signal indicating that she did not or could not give way and allow the Evans to pass to the starboard. The Evans responded to that signal by a further signal that she could not go to the port of the Dole, and put her own helm hard a-port, and went toward the North Pier. The result was that the two tugs came in collision.

There is a mass of testimony, very much of it contradictory in its character, as to the relation which these vessels bore to each other when they mutually discovered each other, and also the distance they were from each other. The weight of the testimony, taking into consideration its credibility and probable truth from all the surrounding circumstances, satisfies my mind that the Evans was within about sixty feet of the North Pier at the time she discovered the Dole, and from three to four hundred feet to the eastward of her, and that the Dole was from six to twenty feet from the North Pier; that the relation of the two vessels was such as to bring them within the rules and regulations prescribed by the law in regard to vessels approaching each other upon converging or intersecting lines, and that the Evans not only had the right of way, but it was her duty to go to the starboard of the Dole. They were both so close to the pier that I think it was clearly manifest that they were approaching each other on converg-

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ing or intersecting lines. The question is, What was their respective duty under the circumstances?

The law fixes that they are each to give way. Where they are both steam vessels the rule of the road to be observed is, that each is to go to the right. The Evans indicated, on the first discovery of the Dole, her intention to obey this rule, and gave the signal which is required for that purpose, which was understood by those on board the Dole. The Dole, for some reason not very satisfactorily explained, refused to yield the way to the Evans, and indicated by a signal well understood on board the Evans its desire to keep on its course and pass, of course, on the port side of the Evans. The Evans at once responded to this signal by a signal indicating that she would not give way or yield the right which the rules and sailing regulations gave her to go to the starboard. No further response was heard on board the Evans as to whether they would yield or not.

The question then is, Had the Evans a right to suppose that, having insisted on its right to go to the starboard, the Dole had yielded, although they had first indicated their wish or desire to pass upon the other side; and had those in the management of the Evans the right to assume that the Dole had abandoned its intention to pass upon the port side by not responding to their second signal?

I do not think that the mere failure to respond to the second signal of the Evans was enough to justify the Evans in running recklessly and without due care across the bows of the Dole under the circumstances; there might have been some supervening and controlling cause which prevented absolutely the Dole from going to the starboard, and therefore it should have been and was the duty of those in charge of the Evans, on being apprised of the location of the Dole and their disinclination to go to the right, to proceed with caution. But the evidence shows that the Evans did proceed with caution; that putting their helm a-port so as to go to the starboard, the Evans shut off and proceeded slowly, and

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finally reversed its wheel as they saw the Dole was not changing its position. The two vessels came together in such a manner as to indicate that neither of them were moving very rapidly at the time the collision actually occurred, and the fault in the whole matter—the proximate cause—seems to me to lie in the fact that the Dole was upon the wrong side of the stream.

It is contended on the part of the respondents that this was the open lake, and that the rules of the river do not apply there; but I apprehend that the moment the channel is obstructed by the North Pier, you are within the harbor of the city, and the rules of river navigation apply with their full force. The evidence in this case, even if evidence were wanted on the subject, goes to show that the true course for tugs descending the harbor, going into the lake, is along the middle of the stream, or south of the thread of the stream, while the course for tugs ascending is along the North Pier. This is only the usage, but it would seem to be the law of the case, as applying the law of the road, the laws of river navigation and harbor navigation, to the conduct of vessels operating within the waters of Chicago harbor. It is true there was open water to the south of this pier and that vessels could go to a wide range to the south, limited only by their draft of water; but the range to the north was limited by the North Pier, and it was in the route where returning tugs, or tugs with tows, or vessels coming into the harbor, would naturally be. A tug going down,—going out of the harbor,—with the entire range to the south of them unobstructed, should certainly—whether it is a matter settled by usage or not (and if not settled now, it should be hereafter)—understand they are not in the right place when they are hugging the pier. The ordinary rules of the way apply to the river and harbor as far as the harbor is controlled by the artificial structure for the purpose of making the harbor, and vessels navigating the waters there are governed by the ordinary rules of river and harbor navigation.

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struct you that a person claiming title under this statute, that is, under this limitation law, must deduce a title directly from either of the specified sources, each link in the chain of which shall be genuine; that is to say, the parties setting up such a title cannot claim under a title where any of the links are forged, no matter how innocent the person setting it up may be. He is bound to know and to stand by the genuineness of the respective conveyances in his title, and if any of them fail, his title under this statute, then, would fail;—that is to say, he would not have made out the case provided for in the statute. In order to make out a defense under this statute, he must deduce a title by a chain of genuine conveyances. Then, if you shall believe, from all the evidence that has been adduced, that the deed from Timothy Hedges to Thomas Mullen was not a genuine deed, you will, of course, find for the plaintiffs on that point, because the defendants will not have made out the defense which they set up under that branch of the case.

If you shall come to the conclusion that this deed was not forged, or that there is not sufficient proof of the forgery, then they will have made out a chain of title which would answer the requirements of the statute.

Verdict and judgment for defendant.

Campbell vs. Barclay.

CAMPBELL vs. BARCLAY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER, 1870.

DAMAGES FOR INFRINGEMENT.

1. The price for which the plaintiff has sold his rights to certain territory is no criterion by which to determine the value of his patent, or the damages sustained from its infringement.

2. Nor are such damages to be estimated solely by the profits which the defendant actually realized, for he may have conducted his business unskillfully.

3. The true question is, What advantage might the defendant, by skill, have obtained by using the patented device instead of the old device.

Action at law to recover damages for an alleged infringement of letters patent, dated in 1865, granted by the United States to the plaintiff for an improved tool for making metallic seams for showcases.

Merriam & Alexander, for plaintiff.

Eldridge & Tourtellotte, for defendant.

BLODGETT, J., after describing to the jury the characteristics of the patent, and it being admitted that the defendant infringed the plaintiff's patent, instructed the jury as to the rule for computing the damages, as follows:

The mere infringement of the plaintiff's patent entitles the plaintiff to nominal damages, without any proof as to the actual amount of damage sustained; but if the plaintiff seeks to recover more than nominal damages, he must show the extent of the damage he has sustained, and recover by that proof.

1. The price for which the plaintiff has sold his rights to

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certain territory is no criterion by which to determine the value of his patent or the damage sustained by its infringement in the territory retained. Inventors are frequently compelled by stress of poverty or force of circumstances, to dispose of some part of their rights in the thing invented at much lower rates than they and others know them to be worth. The fact that the inventor has sold or given away some portion of a patented right is no justification to another who has wrongfully infringed upon the rights retained.

2. Nor is the amount of damages to be measured solely by the profits which the defendant realized by the use of the patent, because he may have conducted his business in so unsuccessful a manner as to have made no profits, notwithstanding the use of the patent. In other words, he might have lost money in the business whether he used the patented tool or used the old-fashioned implement.

The true question is, What advantage, if any, did the defendant obtain, or might he by skill have obtained, by using this patented device, over the use of the old device or process to obtain the same end, and what does the evidence show such advantage to amount to in money, as nearly as you can reduce the same to money?

The plaintiff has a right to a fair compensation under the evidence for the infringement of his right, but at the same time the damages awarded must not be oppressive or vindictive.

Verdict for plaintiff, and damages assessed at \$300.

MARGARET J. C. BROWN vs. KNEELAND F. ADAMS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER, 1870.

TRANSFER OF STOCK—RIGHTS OF HOLDER.

1. **TRANSFER—WHAT CONSTITUTES.**—When stock is, by its terms, transferable only on the books of the company, its delivery to an officer of the company with a request that he transfer it, is not sufficient to pass the legal title. Until it is actually transferred, the assignee has no legal right of action in his own name.

2. **DISTRIBUTIVE SHARE.**—It is not the right of a court of law to inquire into the rights of a stockholder to a distributive share in the assets remaining after an adjustment of the affairs of a corporation.

3. **CASHIER—AGENCY.**—A cashier who has made sale of corporate property, and holds a balance in his hands, must be deemed the agent of the board of directors, and not of the respective stockholders, and cannot be charged by an individual stockholder as holding such balance for his benefit.

This was an action of assumpsit containing several common counts and one special count. Demurrer interposed to the special count. The pleadings are stated by the court.

BLODGETT, J.—The substance of the allegation of the special count is, that on the first of March, 1866, one Cowen was the owner of fifty shares of the capital stock of the First National Bank of La Salle county, and that said stock was by its terms "transferable only on the books of said bank, in person or by attorney, on the surrender of this certificate;" that on the first of March, 1866, said Cowen, the owner of the certificate, assigned the same to plaintiff, and the same was

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delivered to the defendant, who was then and there the cashier of the bank, with the request that he would make and prepare the necessary entries for the assignment of said stock on the books of said bank. There is no averment that it was so assigned, or that the cashier, who is the defendant in this case, complied with the request. The form of the certificate itself, as shown by the plaintiff's declaration, shows that no property accrued, no legal right to the stock, until this transfer had been made upon the books of the corporation. A mere request to an officer of a corporation to make such a transfer, does not operate as a transfer; and, of course, until this assignment is made on the books of the corporation, the legal right to the stock represented by the certificate remains in the original owner therein named. The familiar rule of law, that the suit must be brought in the name of the owner of the legal interest, is therefore contravened by this declaration, because it does not show that the present plaintiff ever acquired any legal interest in the stock. The declaration goes on to aver, as the cause of action, that, on the day mentioned, the said defendant, being the cashier of said bank, sold and assigned to "blank," all the assets and property of the said bank for the benefit of each and every of the stockholders of said bank, and has had and received therefrom to and for the use of the stockholders of said bank, and in excess of all liabilities, etc., the sum of \$60,000, and that said defendant received plaintiff's distributive share.

I cannot conceive it to be the right of a court of law to inquire into the right of each of the stockholders in this corporation to the respective distributive shares in the balance of assets remaining after an adjustment of its affairs. It would involve an inquiry into the entire condition of the bank, an inquiry in which one only of the stockholders is a party, and which might affect injuriously the rights of all the stockholders. It seems to me that a sale of this kind could only have taken place at the instance of the board of directors, and the defendant cashier, who is alleged to have

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made the sale, must be held to be the agent of the board of directors of the corporation; and if he holds the proceeds, he holds them as the agent of the bank, not as the agent of the respective stockholders; in other words, he holds these proceeds as one of the officers of the bank, and this suit should be brought against the bank itself, if at all. It seems to me that the case made here does not show a cause of action against the defendant, either as to a right of action in the plaintiff, or any liability to the plaintiff on the part of the defendant.

Demurrer sustained.

ANGUS McDONALD vs. FRANKLIN K. ORVIS.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER, 1870.

PLEADING—DEMURRER.

1. A plea that the written contract set forth in the declaration is not the contract made by the parties, but is a fraud upon the defendant, is bad on demurrer; it is an attempt to change a written contract by oral testimony, and is also bad for uncertainty.

2. Where the general issue has been pleaded, a demurrer to a special plea cannot be carried back to the declaration. Having tendered an issue of fact, the defendant cannot claim the benefit of a demurrer.

Demurrer by plaintiff to the last plea filed by the defendant and setting up, in substance, that the contract, a written

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one, declared upon was subsequently changed or another contract entered into between the same parties. It reads, "averts that the said last-mentioned contract, as set forth in the declaration, does not set forth the contract as made between the parties, but that the same was drawn up by the plaintiff and is a fraud upon the rights of the defendant."

Waite & Clarke, for plaintiff.

J. B. Bradwell, for defendant.

BLODGETT, J.—This plea amounts to an averment that the written contract, or the modification of the original contract, which is set up in plaintiff's declaration, is not the true contract made between the parties, but that it is a fraud upon the defendant.

I cannot conceive that an averment of that kind would allow the introduction of any testimony such as would sustain the averment on a trial of the cause at law. It is, in substance, an attempt to modify or change a written contract by parol testimony. The preceding plea avers that the contract was different from what is set up in the declaration, and concludes with this proposition to offer parol evidence to show wherein it differs. I think the demurrer to the plea is well taken, not only for this cause, but for the cause of want of certainty in the plea itself in not stating wherein it is different. I do not think there is enough certainty in the plea, even if it did not seek to change a written contract by parol evidence.

But it is answered on the part of the defendant that a bad plea is a good and sufficient answer to a bad declaration, which I understand, of course, to refer to a well-known rule of pleading, that a demurrer, when taken to a plea, may be made to reach back to the declaration or pleading where the first defect originated; and under many circumstances that rule is applied, but in this case the declaration contains two

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counts—a special count on a special promise, and the common counts. The plea purports to answer the entire declaration, and of course if a general demurrer had been introduced to the whole declaration, the demurrer would have to be overruled, because there is one good count in the declaration, the common counts for goods sold and delivered, money lent, &c.

There is also an exception to the rule contended for by the defendant's counsel, which is well recognized, viz.: that a demurrer cannot be carried back to the declaration if the general issue has been pleaded; because if it should, it would enable a party, after having tendered an issue of fact on the declaration, to raise an issue of law by putting in a bad plea. If a party wishes to demur to the declaration, he must do it before he tenders an issue of fact. The proposition is undoubtedly sound where there is not an issue of fact made, but here, inasmuch as the demurrer is general, if carried back, the declaration, as a whole, would be sustained, because it has one good count, and because the defendant has already made an issue of fact on the declaration.

The demurrer must be sustained.

Hankin vs. Squires.

CHARLES M. HANKIN ET AL. VS. WM. H. SQUIRES.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER,
1870.

1. POSSESSION OF TIME DRAFT.—PRESUMPTION.—The possession by the payee of a time draft unaccepted and uncanceled, is not evidence, *prima facie*, that he had paid it. There not being, until acceptance, any obligation on the part of the drawee, the rule applicable to promissory notes does not apply.

2. BURDEN OF PROOF.—When payment is alleged it is on the defendant.

3. CIRCUMSTANCES.—PRESUMPTIONS.—Where it is the custom of a bank to stamp all drafts paid at its counter, the jury may consider the absence of such stamp on a draft claimed to have been paid to the teller, as a suspicious circumstance; also, the fact that by the books of the bank the draft did not appear to have been paid; also, the fact that the payment or presentation of a time draft would be a circumstance which the officers of the bank would be likely to recollect.

4. CHARGING JURY.—STATE LAW AND PRACTICE,—are not binding on the federal courts.

Assumpsit by the plaintiffs, merchants in New York city, to recover \$658.50, balance of account for which they had drawn a ten days' draft on the defendant, July 10th, 1868, through the First National Bank of Chicago. Defendant pleaded payment of the draft, and offered the draft in evidence, but without any marks of cancellation. The facts are fully stated in the charge.

Chas. Hitchcock, for plaintiffs.

Geo. W. Brandt, for defendant.

BLODGETT, J., charged the jury as follows:

It is claimed on the part of the defendant that the possession of this draft by the defendant, and its production in court, is *prima facie* evidence that he has paid it. I do not agree with the counsel for the defendant in this view of the law, but

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instruct you that the possession of this draft is no evidence that it has been paid by the defendant. So far as the face of the draft is concerned, the defendant is not a party to it. It has never been accepted by him, and no liability has ever been assumed upon the face of the paper by the defendant. Before a party becomes liable upon a time draft, he must accept it. As yet it is a mere request on the defendant to pay this amount of money. He might and was at liberty to refuse to accept and throw the plaintiffs back on their original account. He has not accepted the draft in any form, and therefore I do not think the rule of law with which you are all familiar, that when you take up your promissory notes and get them it is evidence you have paid them, applies in this case, because a promissory note is a completed instrument—an obligation on the party who makes it—and when a party takes his obligation into his possession, it is at least *prima facie* evidence that he has paid it and is entitled to such possession.

The evidence, then, as to whether this draft has been paid must rest on the testimony of the parties outside of the production of this draft by the defendant in court.

In the first place, then, I will say to you that the burden of proof in this case is on the defendant. He admits the plaintiffs' case against him; he admits that he has received the goods with which they charge him, and that he at one time certainly was lawfully indebted to them for the amount of their claim, and he sets up, by way of defense, that he has paid it in this particular manner. He must make out clearly and to your satisfaction that it has been paid. Mere surmise or guess-work, and presumption not founded on well-proven facts, ought not to be indulged in.

The draft in question does not bear upon its face, or any where upon it, the stamp of the bank which its officers state to you it should bear if it had been paid. This circumstance is a strong one which I commend to your consideration, as going to show, under all the testimony, that this draft has not been paid. We all understand that large moneyed institutions

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must have a systematic way of doing business, and it is an undisputed fact by the testimony here, that whenever drafts are paid at the counter of this bank, they are invariably stamped with the stamp of the bank.

The defendant claims that on the occasion he paid this ten-days'-time draft he also paid a sight draft to the same bank. He produces this sight draft in evidence, and it bears a stamp showing payment.

The defendant testifies that immediately on receiving his drafts, which he paid in the due course of his business, he transmitted them to a correspondent in New York, for the purpose of showing that he had paid them, and thereby showing that he was in good credit. It occurs to me that if a party wished to bolster his credit by showing that he had promptly met his drafts, even before maturity, by transmitting them to business men, that he should show they bore on their face the impress which business men would usually look for as evidence that they had been paid, and where one of these drafts was stamped and the other not, it seems to me that a shrewd business man, who was dealing honestly and wished to impress others with the conviction that he was not only honest, but able to pay his debts, would have insisted that the other draft should be similarly stamped; and if on inspection he had seen that one was stamped and the other was not, he would have returned it to the teller to whom he paid the money, for the purpose of having it stamped, so that it too might bear on its face the evidence of its being liquidated.

The defendant, however, testifies that on the 14th of July, 1868, the day that he paid this sight draft, he went into the bank and paid both these drafts, and for the purpose of his defense he says that he paid the money to the teller. The teller of the bank should be as much his witness as he himself to establish this fact, and the books of the bank should also show such payment. It is in evidence before you that the books of the bank show that this money was not paid; or, rather, there is no evidence that the money was ever paid or received

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by the bank. The evidence tends to show that the draft was handed out through the window to the defendant, for the purpose of acceptance at the time he paid the sight draft. The draft was not yet due; it had thirteen days yet to run. You are all aware that it is rather an extraordinary circumstance for a man to pay a draft of this kind thirteen days before its maturity, and you will take notice, as you have a right to do, of the fact that such a circumstance, if it occurred, would be likely to impress itself upon the agents of the bank who were charged with the duty of receiving the money on such a draft. It is true that Mr. Squires, the drawee, had a right to pay the draft when it was presented to him for acceptance, but if when it was presented to him for acceptance he had paid the money instead of accepting it, that would be a circumstance so much out of the course of business as to naturally impress itself on the memories of those concerned in the transaction; and yet the tellers who participated in the transaction, testify distinctly that the draft was not paid.

The witnesses for the plaintiff, brought here on behalf of the bank, testify that there was no money paid to them; that the draft was passed out for acceptance. It is not an extraordinary circumstance for a person to whom a draft is so presented to wish to take it to his office or place of business for the purpose of comparing it with his books and determining whether it is right or not; therefore it is not very probable that the fact that the draft was not returned immediately to the window drew much attention.

Verdict for plaintiffs.

On motion for new trial:

BLODGETT, J.—I have given this case a good deal of consideration. The authorities in this state in relation to courts charging the jury are not binding on this court. I am satisfied the court did not travel beyond the limits of the practice allowed in the federal courts. The motion for new trial is overruled.

The Sam Gaty.

THE SAM GATY.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER, 1870.

IN ADMIRALTY.

1. COLLISION—RULE OF DAMAGES.—To a libel for collision, it is not a sufficient defense to set up that a sound boat would not have sustained any damage from the collision. Such allegation is mere conjecture.

2. The proper rule of damages is to allow the expense of raising the vessel and putting her in repair, with a reasonable allowance for loss of time and freight, and damage to the cargo.

3. ABANDONMENT BY OWNER.—Where the owner had, after collision, allowed the boat to lie until she became worthless, he can only recover under the above rule. He has no right to abandon the vessel and claim a total loss.

4. ESTIMATED DAMAGES.—Where, in such case, the only evidence introduced was as to the total value of the boat, the court may either allow nominal damages, or estimate them from the court's knowledge of such cases and the general facts proven.

Libel by Bohan S. Sheppard, owner of the canal boat E. R. Hooper, for damages caused by a collision. The facts are stated in the opinion.

Rae & Mitchell, for libellant.

George Willard, for respondent.

BLONCETT, J.—It appears from the pleadings and proofs in this case, that in March, 1868, the canal-boat E. R. Hooper was lying at the landing at Beardstown, on the Illinois river, next to a barge fastened to the shore, and that the steam-packet Sam Gaty, then engaged in the business of

The Sam Gaty.

navigating on that river, while making a landing at Beardstown, struck against the canal-boat E. R. Hooper and crowded it against the barge so as to spring off some of the planks or siding of the canal-boat on the land side of it, causing a leak whereof it sunk that night in four or five feet of water. The witnesses differ as to the degree of care and skill used by those in charge of the Sam Gaty in making the landing, those for the libellant showing that she struck hard against the canal-boat, while those for the respondent insist she did not, and that the crushing in of the side of the canal-boat was wholly due to the rottenness of its timbers, and that a sound boat would not have sustained any damage from such a collision.

Whether a sound boat would have sustained any damage or not under the circumstances, is mere conjecture, and as all the witnesses agree that the steamer did strike so hard against the canal-boat as to cause it to leak at once and shortly after to sink, and it does not appear that there was any fault on the part of those in charge of the canal-boat, I am disposed to hold the steamer responsible for the damage done to the canal-boat by the collision.

It is difficult for me to determine, from the evidence, the amount of that damage.

The witnesses for the libellant swear it was worth from twelve hundred to fifteen hundred dollars, but, under the circumstances, I do not think its value at the time is the fair rule of damages.¹

The boat had been lying at Beardstown during the preceding winter and until the time of the collision, waiting, unsuccessfully, for business after the opening of navigation, because, it is stated by the witnesses, no insurance could be effected on cargoes shipped upon it. Whether that testimony, which seems to be hearsay, is true or not, it is clear from the evidence that no effort was made to raise or repair the canal-

¹ *The Baltimore*, 8 Wallace, 877.

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boat until the water in the river had so far subsided in the spring or early summer as to leave the boat high and dry on the shore, and there is before me no evidence that any effort was ever made to repair or use the boat again. The rule of damages in such a case of collision, is to allow the injured and innocent vessel "the expenses of raising the vessel and putting her in repair, with a proper allowance for loss of freight and for damage to the cargo and for the detention of the vessel for the time necessary to make the repairs and fit the vessel to resume her voyage."¹

In this case, the item of damages seems to be the cost of raising the boat, the cost of repairing it, and proper compensation for the detention of the boat during the necessary time of raising and repairing it. The rule, and the reason for it, are stated and considered with great fullness in the case cited above, but there is no evidence before me tending to show what is the amount of damages proper to allow the libellant. Under such circumstances, the court can do one of two things—either allow the libellant but nominal damages, because he has not proved the amount of his damages, or to make a conjecture and find, merely on the court's knowledge of such matters, as to what ought to be allowed the libellant.

In view of the fact that this case has been pending a long time, and that it will be difficult for the libellant to prove the damages to which he is entitled, I have decided to allow him one hundred dollars for the expense of raising the boat and the loss of time consequent upon the collision, and fifty dollars for the cost of repairing and injury done to its sides by the collision and to its hold by the water let into it—or \$150 in all. I do this, because I think the libellant is entitled to some damages, but he has not proved how much, and the only rule to be applied in such a case is that stated by Judge Grier in *The Harriet Rogers*, 3 Wallace, Jr., 379, thus

¹ *The Baltimore*, 8 Wallace, 337.

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"the amount it would cost to repair the damage, with some allowance for demurrage;" but the doctrine of abandonment of the injured vessel to the party causing the injury has no application in such a case, but the injured party must use all reasonable measures to stop the progress of the damage caused by the collision.

Let there be a decree for libellant for \$150.

THOMAS VAN AVERY vs. THE PHOENIX INSURANCE COMPANY OF HARTFORD, CONN.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—NOVEMBER, 1870.

Where the declaration is special, stating facts and circumstances, a plea setting up the same matter is bad; they can be given in evidence under the general issue.

O. B. Sansum, for plaintiff.

Miller & Van Arman, for defendant.

BLODGETT, J.—In this case a demurrer is interposed to the special pleas of the defendant. The first plea is in substance, that the suit has not been brought within one year from the time the loss occurred, upon the policy of insurance. The second plea is in substance that the loss occurred while the steamer was engaged in saving a stranded vessel off a reef, whereby it is claimed that she vitiated her policy and that the insurers are not liable.

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The pleader who drew the declaration has averred the specific manner in which the loss occurred, that she was relieving a stranded vessel, and that it was in pursuance of an immemorial custom among persons engaged in the navigation of these waters that such relief should be rendered.

I am inclined to think that both these pleas, in view of the averments of the declaration, are nothing more than what can be given in evidence under the general issue. I do not think that the second plea, the last plea in reference to showing the manner in which the loss occurred, is anything more than a reiteration of the matter in the declaration. The question as to whether it does present a defense is one to be decided when the evidence is taken as to whether such a custom exists. I think that the defense under the first plea can be given under the general issue. It is a mere question of fact to be determined on the trial.

Demurrer to special pleas sustained.

United States *vs.* Schimer.

UNITED STATES *vs.* SCHIMER.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—DECEMBER, 1870.

INDICTMENT—PLEADING.

1. **EXCEPTION IN STATUTE.**—In an indictment under the act of July 13th, 1868, for removing malt liquors without affixing and canceling the proper stamps, it is not necessary to negative the cases where the law authorizes a removal without affixing a stamp.

2. The presumption is that the liquor is only to be removed when sold or ready for sale, and if the removal was in a case allowed by law, that fact should be set up by way of defense.

3. **EXCEPTION IN STATUTE.**—Where an exception in an act does not occur in the enacting clause it is not necessary to set it out or negative it in the indictment. It is matter to be set up by way of defense.

4. **PARTICULARITY REQUIRED—SPECIFICATIONS.**—In an indictment for a statutory misdemeanor it is not necessary to charge the offense with the particularity of time, place, and circumstance, required for a felony, or common law offense; and if the defendant desires greater particularity he should apply to the court for a rule for such specifications and particulars as will enable him properly to prepare for trial; the prosecution will be held strictly to their bill of particulars.

Motion to quash an indictment under the revenue act for removing five kegs of lager beer, without affixing and canceling the stamp required by law.

J. O. Glover, U. S. District Attorney, for the United States.

R. G. Ingersoll, for defendant.

BLDGERTT, J.—I have examined the law bearing upon these questions which have been raised on this motion to quash, and shall be obliged under the authorities to overrule the motion.

The objection taken against this indictment is that the de-

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fendant is charged with having removed five kegs of lager beer without affixing and canceling a stamp denoting the tax on said beer, and that by the internal revenue law lager beer was not subject to a tax until it was removed for the purpose of sale; that it might be removed for various purposes, such as to change the place of warehousing and various other purposes under the various provisions of the act of 1866¹ without subjecting it to a tax, and that it is therefore the duty of the pleader to negative in his indictment any and all of these innocent removals which a party might perform without subjecting his beer to a stamp duty; that is to say, according to the position taken by the defendant's counsel it was the duty of the pleader on the part of the Government to negative all cases where the law authorized a removal without the affixing and cancellation of a stamp.

The case comes within the general rule which is laid down in Wharton,² and I think it fully answers the argument of the defendant. The clauses quoted and relied upon by the counsel are all of them in different sections from that which prescribes these penalties, and furnish exceptions to the general rule. The act taken together—the act of 1866, and all the acts amendatory of it—provides that beer is not to be removed from the place of manufacture until it is stamped; the presumption is, it is only to be removed when in condition for sale, and when it is sold. The removal is not to take place, under the general scope of the act, until the kegs are properly stamped and the stamps canceled. All the cases where removal can take place without the cancellation of the stamps are exceptional to the general principle of the act, and therefore the case comes within the principle laid down in Wharton: “It is not necessary to charge in the indictment anything more than is requisite to make out the offense.”

¹ Act of July 13th, 1866, 14 U. S. Statutes at Large, 166, §§53, 54.

² Wharton on Criminal Law, § 292.

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In other words, it is sufficient as a general rule to charge an offense in the language of the statute. That is a fundamental law of pleading.

The principle is understood by all members of the bar that where the exception does not occur in the enacting clause it is not necessary to set it out in the indictment, but where it occurs elsewhere than in the enacting clause, the exception may come in by way of defense, and it is not necessary for the pleader to set it out. The application of this principle disposes of this objection to the indictment.

The next objection made to the indictment is that it is too general. The language is that defendant on a certain time "did carry on the business of a brewer, and did then and there remove from his brewery a large number, to wit., five kegs of lager beer, and did then and there neglect to affix and cancel on said kegs the stamps required by law." The objection taken to this averment is that it is too general, that it does not point out to the defendant with sufficient particularity the specific offense with which he is charged, that is, the time, place and circumstances under which he committed the offense, so as to enable him to prepare for a trial.

If this were an indictment for a felony, or was even a common law indictment, I think the objection would hold good, but coming under a class of offenses known as purely statutory, and a misdemeanor, where the pleading is much more loose, the rule has grown up, especially in the English courts under their revenue law, of requiring with these specific charges a bill of particulars whenever the defendant made it appear to the satisfaction of the court that it was necessary for the purpose of trial that he should have such specifications, pointing out the character of the offense so as to enable him to prepare himself properly for trial.

I shall therefore overrule this motion to quash the indictment, with the statement, however, that in all cases where the charge is general, like this, if the defendant asks for a bill of particulars, or that the prosecutor shall file in the case a de-

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tailed statement of the time and place of the occurrence described, I shall make a rule to that effect, in order that no excuse of want of certainty may delay the trial of the cause. The prosecution will then be held strictly within its bill of particulars and specifications.

Motion to quash overruled.

The same rule above laid down by Judge Blodgett, was applied by Judge Drummond to a case of information for a forfeiture, where he held that it was not necessary for the information to allege that the case was not within a proviso in the statute; that it was for the defense to set up anything coming within the proviso. *The Mary Merritt*, Vol. 2 of this Series, 381; consult also *United States vs. One Distillery*, 4 do., 260, and notes thereto; *United States vs. Cook*, 17 Wallace, 178; *The Merritt*, *id.*, 582.—[Reporter

N. S. GIBSON, ASSIGNEE OF JOHN N. DOBIE, BANKRUPT,
vs. JOHN N. DOBIE ET AL.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—JULY,
1871.

IN EQUITY.

1. PREFERENCE—CONVEYANCE TO WIFE.—A conveyance by an insolvent debtor of his real estate to his wife, without consideration, she giving a mortgage thereon to creditors who knew the debtor to be insolvent, is a preference under the Bankrupt Act and void as against creditors.

2. The mortgage of the wife is the same, in legal effect, as the mortgage of the husband.

Bill by the assignee against John N. Dobie, Hannah R. Dobie, his wife, John T. Burhyte and Henry N. Glening, to set aside conveyance as fraudulent under the bankrupt act. The facts are stated in the opinion.

Gibson vs. Dobie.

J. W. Pinter, for complainant.

J. M. Jillett, for defendants.

MILLER, J.—John N. Dobie, as guardian of Andrew B. Cary, his step-son, became indebted to his ward about seventeen hundred dollars, early in the spring of 1868, and embarrassed pecuniarily. Burhyte, his surety on the guardianship bond, demanded security or indemnity. Dobie gave Burhyte a mortgage on his homestead. By a subsequent arrangement, Dobie was discharged as guardian, and his wife, Hannah R. Dobie, the mother of the child, was appointed guardian in his stead. In April, 1868, Dobie and wife conveyed two tracts of land to the defendant Glening, who, with his wife, conveyed the same premises to Hannah R. Dobie. These conveyances were made for the purpose of vesting the title to the two tracts of land in Mrs. Dobie, and enabling her to secure Burhyte, her brother, as the surety of Dobie. The mortgage of Dobie to Burhyte on the homestead was satisfied of record, and Mrs. Dobie gave him a mortgage on the two farms in lieu of the former mortgage. Dobie also assigned to Burhyte a mortgage of three hundred dollars on other property.

Proceedings in bankruptcy against Dobie by his creditors were instituted in July, 1868. Prior to such proceedings, on the 14th of July, 1868, Dobie assigned to Burhyte the three hundred dollar mortgage, and also, on the same day, Mrs. Dobie gave him the mortgage. Burhyte had abundant reason to believe that Dobie was insolvent at the time he accepted these securities, and he also knew that Mrs. Dobie became the alienee of the lands without any consideration, and that Dobie, at the date of these conveyances, was largely indebted.

The mortgage of Mrs. Dobie to Burhyte is the same in legal effect as if Dobie and his wife had given it directly to him. The mortgage of Mrs. Dobie was a mere device to

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relieve the homestead of the debtor, and to shift the lien upon the land. These collaterals were given and accepted by Burhyte as a preferred creditor, in disregard of the provisions of the bankrupt act.

A decree is ordered for the complainant.

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DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—AUGUST,
1872.

IN ADMIRALTY.

1. **CAPTAIN HAS NO LIEN—SERVICES AS CLERK.**—It being a well-established rule in admiralty that the contract of a captain is personal, and that he has no lien for his services, he cannot maintain a libel for additional services as clerk or manager without showing a special contract designating the extra compensation to be paid him as such.

2. **EFFECT OF SALE OF CLAIM.**—The lien of a mariner is strictly personal, and if he reduce it to a common law judgment, which he sells, no libel can be maintained thereupon, either by himself or for the benefit of the assignee.

3. **BOAT USED FOR FERRY.**—A vessel plying between several points on the Mississippi river, on opposite sides, and within a distance of six miles, is amenable to the admiralty, even though her main business be that of a ferry-boat between points on opposite sides of the river.

4. **EFFECT OF FERRY FRANCHISE.**—The fact that such boat was owned and run by a company possessing a ferry franchise does not change the character of the service.

5. The width of a stream or length of a voyage is no criterion by which to determine the character of the service, nor the question of admiralty jurisdiction.

6. **WAIVER OF MARITIME LIEN.**—A mariner's lien will not be considered

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as waived by anything less than an express contract. Attaching the vessel under a state law, and settling that proceeding on receiving notes secured by a mortgage on the vessel, which afterwards become worthless, does not constitute a waiver of the maritime lien. A libel may still be sustained, and the decisions as to waiver of liens under state statutes are not applicable.

Libel for mariner's wages, filed by Daniel McFarlane, W. H. Thomas, Jno. O. Butler, Joshua Edginton and Philip Coonrod, setting forth in substance, that they were respectively "seamen on board the Gate City, of which the said Coonrod was master; that the said steamboat is a vessel of more than fifty tons burthen, was duly enrolled and licensed, and engaged in the business of commerce and navigation upon the waters of the Mississippi river, bordering upon the states of Illinois and Iowa, which said waters were navigable from the sea by vessels of more than ten tons burthen; that during the season of the year 1870-71, while said steamer was so engaged upon the waters aforesaid, the said libellants were duly engaged to render service as mariners in running and navigating the said steamer upon the waters aforesaid, and, in pursuance of the engagement aforesaid, did render such service during the season aforesaid; that the said services were rendered by Butler and McFarlane in the capacity of engineers of said steamer, said Edginton served as fireman, Thomas as pilot, and Philip Coonrod served as clerk and general manager of said boat."

The hearing of the case shows that there was due the libellant Butler, for his services as pilot, the sum of \$35; to McFarlane for his services as engineer, \$275.40; to Thomas for his services as engineer, the sum of \$251.45; that there remains unpaid to Edginton the sum of \$32.45; that Coonrod, the other libellant, while he claimed in the libel for services as clerk and general manager of the boat, was, in point of fact, the captain.

Further facts are stated in the opinion.

BLONDETT, J.—Though Coonrod may have acted as captain of the boat, it is impossible to distinguish between the services which he rendered as captain and the services which he rendered as clerk or general manager, so far as his compensation is concerned.

It being a well established rule in admiralty that the captain or master of a ship has no lien for his wages, but that his contract is personal with the owner of the boat, the court cannot, either upon the libel as it stands, or the testimony, decide the compensation due to the master and allow him a lien in admiralty for what may be his fair compensation for the services rendered as clerk. If he performed the duties in both capacities, he should either have made a contract designating what he was to be paid as captain and how much extra as clerk, or he must be content to abide by the rule in admiralty and take his pay for all the services performed in capacity of captain alone and forego his lien.

So far as the libellant Edginton is concerned, the proof shows that he received a due-bill for the balance due him, on which he obtained a judgment, which he afterwards, and sometime prior to the filing of this bill, sold to Ebyard & Derano of Keithsburg.

The proof, being that of the libellant himself, is conclusive that he had no interest in this claim for wages at the time this suit was brought, and it is noticeable that while all the other libellants sign the libel and verify it, the name of Edginton does not appear upon the libel, either in the signing or verification. I, therefore, have no doubt but what this claim was properly assigned by Edginton to the parties named, and that he has parted with all his rights, and that this suit cannot be maintained, even in Edginton's name, for the benefit of these parties, the maritime lien being personal to the mariner and not being assignable to other parties, especially after he has had recourse to a common law court and obtained a judgment on it.

The proof also shows that McFarlane and Thomas per-

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formed services in their respective capacities, upon the boat, to the amount of the claims set up in the libel respectively, that is to say, \$275.40 for McFarlane, and \$251.45 for Thomas.

The defense set up against the recovery of these claims is twofold.

First: That the steamer Gate City was nothing but a ferry-boat, and that a court of admiralty has no jurisdiction over the transactions of a boat merely engaged as a ferry-boat; that a maritime lien for wages does not attach to a boat engaged in such service.

The evidence shows that this steamer was employed in the transportation of passengers and freight between Keithsburg, in the county of Mercer in this state, and the opposite shore of Iowa, touching at various points upon the Iowa shore, ranging from three miles above Keithsburg to the same distance below, according as the stage of water or the business made it desirable to touch at one or the other point or the point directly opposite, the boat having, according to the proof, some five different landing points on the western bank. The vessel is above twenty tons burthen, and is enrolled and licensed to carry on the ferry, freight and towing business.

There is no doubt but what her tonnage, her equipment and her outfit, in every particular, was such as to bring her within admiralty jurisdiction. The only question is, whether the business in which she was employed was such as is contemplated by the law governing the transaction of maritime business.

The proof shows that the vessel was mainly employed as a ferry-boat—that is, in the transportation of persons and teams between the opposite sides of the Mississippi river; that she also touched at various islands in the river, from which she took wood and hay to Keithsburg, if not to the Iowa shore; that she also brought grain across the river from the Iowa side for transportation on the railroad which terminates at Keithsburg and runs thence east to some point on the

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Chicago, Burlington & Quincy road. She therefore plied between the ports of different states. The particular manner in which she transported her passengers and freight, and the length of her voyages, it seems to me, can make no difference, so far as the maritime character of the business is concerned. The question naturally suggests itself, How wide must a stream of water be across which a ferry-boat must pass in order to divest it of the character of a ferry-boat, contended for by the counsel for respondent, in contra-distinction to the maritime service alleged by the libellants. In one sense of the word, the Cunard line of steamers consists but of ferry-boats, running from Liverpool to New York. They make regular trips on advertised schedules and transport freight and passengers from shore to shore. So, too, take the boats plying between this port and ports upon the opposite side of Lake Michigan. They make regular trips, and, in one sense, are but ferry-boats, and yet no one has ever denied that their business was maritime; and the mere fact that this boat was owned by a company possessing a ferry franchise from the states of Illinois and Iowa, authorizing them to maintain a ferry across the Mississippi river at that point, does not, as it seems to me, change the character of the service. An individual or corporation may be invested with a ferry franchise for the purpose of public convenience, by the state authorities, but when they use, for the purpose of exercising that franchise, a boat which comes within the definition and character which makes it amenable to the maritime laws, then the fact of the ownership of the boat and of the ownership of the right to perform the service in which the boat is engaged does not take from the admiralty courts jurisdiction over the boats, or remove those engaged in it from the protection of the admiralty courts. It seems to me that the width of a river or the length of the voyage makes no difference; it is no criterion by which to determine the character of the service.

I have, therefore, no doubt but what this boat, although

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performing numerous voyages every day, was, at the same time, engaged in such maritime occupation and business as makes her amenable to the admiralty law and the jurisdiction of the admiralty courts.

Second: The second point made by respondents is, that these libellants, sometime in the month of July, 1871, caused this steamboat to be attached by a writ of attachment, issued out of the Circuit Court of Louisa county, in the state of Iowa, upon the debt alleged to be due the attaching creditors respectively from the alleged owners of the boat, to wit.: David Lloyd and Mrs. Coonrod; that the boat was held under this attachment for several days by the sheriff of Louisa county, when, as he testifies, he was directed by the attorney of the attaching creditors to release the boat and return his writ with an indorsement that the release was made by direction of the plaintiffs, which he did, and the record in the attachment case thus commenced, shows that the case was settled and dismissed. It further appears that, while the boat was held under this attachment, an agreement or arrangement was entered into between the attaching creditors and Cabeen & Elliot, who were merchants in Keithsburg, by which it was stipulated, or understood, that the owner of the boat should make a mortgage to Cabeen & Elliot for an amount sufficient to cover this indebtedness, and that Cabeen & Elliot should pay the amount that was due these libellants, together with other creditors, and that these attachment suits were dismissed by reason of this arrangement which was made for the giving of this chattel mortgage. It appears, further, that the boat, during the time these services were rendered, was owned by Lloyd and Mrs. Coonrod in about the proportion of two-thirds to Lloyd and one-third to Mrs. Coonrod; that Lloyd had given a mortgage upon his interest in the boat to one John C. Pepper, to secure the payment of \$150, and that he had given a further mortgage to Mrs. Griswold, to secure the payment of \$100; that at about the time this attachment was levied, Pepper had proceeded to foreclose his mortgage, and

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had put some person on board the boat, ostensibly as keeper or custodian for him, but there is no evidence that Mrs. Coonrod or these attaching creditors had any knowledge or notice that this person was on board in any such capacity. After the boat was released from the attachment in Iowa and came over to Keithsburg, Mrs. Griswold purchased from Pepper Lloyd's interest in the boat, under a clause in the mortgage which authorized the mortgagee, in case of the non-payment of the mortgage debt, to sell the boat at either private or public sale, and the evidence is very conclusive to show that this was a secret purchase, made under such circumstances as go to show that there was collusive action between Lloyd, Pepper and Mrs. Griswold, with the intent of defeating this chattel mortgage which had been given to secure the libellants' wages and the amounts due them respectively. After this pretended purchase by Mrs. Griswold, a writ of replevin was issued from the Mercer County Circuit Court in her favor and executed, by which an attempt was made to place the boat in the hands of Mrs. Griswold under her assumed title. In consequence of these proceedings on the part of Mrs. Griswold, Cabeen & Elliot, the mortgagees, entirely refused to carry out the arrangement which had been made for the payment of the wages and other sums which had accrued against the boat; and the boat, at the time this libel was filed, was nominally in the possession of Mrs. Griswold, although her possession was resisted, and both parties seemed to have had captains or agents on board to represent their respective rights and interests.

Upon this state of facts, it is urged very strenuously by counsel for the respondents and intervening owner, that the maritime lien has been waived.

I am cited to numerous authorities in this state and in the state of Missouri, to show that the taking of any other security, or the resorting to the state courts, waives the maritime lien of a seaman, but an examination of those cases shows that they were all cases where the question was not as to

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the general maritime lien, but upon the question of a lien created by the statute of the respective states—what are known as statutory liens under the boat and vessel acts of the states—which have always been treated by the admiralty courts as standing on a widely different footing from the admiralty or maritime liens known to the courts of admiralty and enforced through these courts.

The general principle in regard to mariners' wages is, that the mariner is, to a certain extent, the ward of courts of admiralty; that his lien for his wages is under the protection of the courts of admiralty, and that no act on the part of a seaman short of absolute payment, or such an act as shows an intelligent intention to waive his admiralty lien, shall be construed as a waiver of such lien. Courts of admiralty take notice of the improvidence, and the ignorance, and of the guilelessness of seamen, and protect their interests, in view of the liability of such persons to be imposed upon by the more shrewd and experienced persons with whom they may come in contact and deal; and, therefore, it is a settled principle of admiralty law, that a seaman or mariner who has acquired a maritime lien will not be construed as having parted with that lien and waived it by anything short of an express contract or payment.

Here the parties resorted, in the first instance, to the state courts of Iowa for the purpose of enforcing the payment of this indebtedness. They did not get their money by that proceeding, but they did obtain what, at the time, appeared to be an arrangement which would ultimately secure them the payment of their claims. Certain parties stepped forward and took a mortgage on the boat and libellants took the notes of the owner of the boat, which were secured by that mortgage. That act did not waive the maritime lien of the seamen, because they received nothing, and they did not, by express word or act, waive the maritime lien. The mortgage proved unavailing in the hands of the parties to whom it was made, by reason of the changes which took

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place in the title to the boat, and consequently the seamen or mariners took nothing by the mortgage and notes. They have not yet been paid, and the mortgage does not in terms, nor do the notes, in terms, or by necessary implication, waive the maritime lien. I cannot, therefore, consider the cases which have been cited as in point to sustain the position taken by the respondent's counsel. The case is not one of an attempt to enforce a mere statutory lien under a state law, which may be waived, under the authorities cited from the state courts, by any act which shows that the seaman or person holding the lien has accepted any other security, and I therefore shall overrule all the defenses interposed and direct a decree to be entered in favor of the libellant Butler for \$35, McFarlane \$275.40, Thomas \$251.45, interest to be computed from July 1, 1871.

The libel must be dismissed as to Coonrod.

Consult next case, as to mate's compensation, when acting in capacity of captain.—[Reporter.]

The Fanny Gardner.

THE FANNY GARDNER.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—AUGUST,
1872.

IN ADMIRALTY.

DUTY OF MATE—LIEN.

1. CLAIM ON DEATH OF OWNER.—A mariner can maintain his libel against the vessel, though the captain be the owner, and die during his service. He is not bound to take any notice of the ownership of the vessel nor to follow the estate of the owner into the probate court.

2. DUTY ON DEATH OF CAPTAIN—COMPENSATION.—A mate who takes command on the death of the captain is entitled to maintain a libel for the entire voyage at his contract price as mate. It is an incident to his contract as mate that it may become his duty to take command, and in that event, he neither loses his lien, nor becomes entitled to master's wages.

This was a libel by A. W. Moran for wages, averring in substance, that on the 25th of May, 1871, the libellant agreed to serve and commenced on that day to serve as mate on board the brig Fanny Gardner at the rate of two dollars per day; that he served in that capacity during the voyage, until the 10th of June, when the captain fell overboard and was drowned, and libellant assumed the command of the vessel and completed the voyage and brought her back to Chicago, her home port, with a cargo. He claims for his services as mate from the 25th of May until the 10th of June at the rate of two dollars per day, the contract price, and, for his services as captain, from the 10th of June to the 22d of June at the rate of one hundred dollars per month.

Rae & Mitchell, for libellant.

W. F. Whitehouse, for respondent.

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BLODGETT, J.—There are two questions made upon this libel.

First, that the admiralty court has not jurisdiction, because the brig was the property of the captain who is dead, and that libellant should prove his claim before the probate court of this county and take his pay in due course of administration.

This principle cannot be sustained. The law giving a specific lien for the mariners wages upon the vessel, takes no notice of who owns it, or of the life or death of the owner, or of any change of ownership. The mariners lien attaches to the vessel, and it is not necessary for the mariner to inquire whether the owner be living or dead. If he has performed maritime service on board the vessel he is entitled to his pay and entitled to enforce his lien upon the vessel in a court of admiralty.

Second, the other question made is that the libellant, having assumed command of the vessel, by the death of the captain, has lost his admiralty lien.

By the common law of the sea, in the case of the death or disability of the captain it becomes the mate's duty to take command of the ship. This is a part of the condition of his entry upon the service; it is what is expected of him and what would be enforced against him. He would be derelict in his duty if he did not assume command of the ship at once upon the death or disability of the captain, he being the next officer in command. It does not follow, because he performs the duties of captain, that he is entitled to captain's wages. It is one of the chances which he takes when he enters upon his employment as mate that he may be called upon during the voyage to assume the duties of captain, but inasmuch as the hiring of a captain is a personal transaction between the owners and the captain, the law will not imply any change in the relation of the mate to the vessel from what the original contract of shipment made, and he still remains mate in command by the occurrence of a contingency which he ought to anticipate. His maritime lien attaches for his wages as mate dur-

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ing the entire voyage, it being his duty to bring the vessel into a place of safety. In this case it does not appear affirmatively whether the mate was obliged to bring the vessel back to Chicago or whether he could have brought her to any other safe port and notified the owner; but he voluntarily assumed command and brought the vessel into Chicago and is entitled to enforce his lien for the amount of his wages according to his contract, which is two dollars per day for twenty-eight days. He admits that he has received five dollars, making fifty-one dollars as the amount due, which will be the amount of the decree.

Consult *The Gate City*, ante 200, as to compensation of captain when serving as clerk.—[Reporter.

THOMAS CAHILL vs. THE ANDES INSURANCE
COMPANY OF CINCINNATI.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER, 1872.

1. FORFEITURE OF POLICY—COMPANY CONFINED TO REASON ALLEGED.—When forfeiture of an insurance policy is claimed for non-compliance with its conditions, the company is bound by the reason which they assign at the time;—they cannot declare a forfeiture on one ground and then claim the advantage of additional grounds, and *it seems* they cannot claim a cancellation broadly, and give any reason they may see fit afterwards.

2. SOLICITOR—AGENCY—PAYMENT OF PREMIUM.—Where an insurance solicitor, who is not the agent of any company, but procures the "placing" of insurance, has placed a risk, and the company delivers him the policy for delivery to the assured, he becomes for that risk the agent of the com-

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pany, and payment of the premium to him binds the company; and though he never pays the money to the company, the policy remains binding, and cannot be forfeited for non-payment of premium.

3. CLAUSE AS TO PAYMENT OF PREMIUM.—This is true though a clause in the policy provides that the policy shall not take effect until the premium is actually paid, for the presumption is that the solicitor was authorized to receive the premium, and when the company has given him the credit, and the assured is thus misled, the company cannot take advantage of this clause.

This was an action on a policy of insurance for one thousand dollars, issued to the plaintiff by defendant, covering a stock of wines and liquors owned by him at No. 176 Washington street, Chicago, for one year from March 5th, 1871, and which stock was destroyed by fire October 9th, 1871. The policy had been obtained through a Mr. Doud, an insurance solicitor, who was not in the employ of any company, but procured the privilege of "placing" insurances. The plaintiff paid the premium to Doud before the expiration of the thirty days limited in the policy for the giving of credit, but Doud never paid it over to the regular agents of the company. The defendant denied the agency of Doud, and claimed that the policy had been duly forfeited—canceled for non-payment of the premium.

The further facts appear in the charge.

Hawley & Talcott, for plaintiff.

Arba N. Waterman, for defendant.

BLODGETT, J., charged the jury as follows:

The only question that is made by counsel upon which any stress is laid is as to whether this contract, in fact, ever went into force—as to whether it ever became operative between the parties.

It appears from the evidence that Mr. Doud's manner of doing business was to call upon parties having insurable property, and solicit from them the business of placing it in some company, and obtaining a policy, and upon their acquiescing in his request, he would make an application to

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one of the companies with which he was operating, perhaps giving the insured the privilege of selecting from the list of companies he claimed to represent; and taking the application of the insured to the agent of the company, he would obtain from the company a policy, and pass it over to the insured, at some times collecting the money when he delivered the policy, at other times leaving it for the company to collect, or collect it himself within the period of thirty days. It is also in testimony here from the defendant, that this company did not employ this man as its agent, but that he had placed some risks with that company in the manner described, that he had made the solicitation himself, and the company had accepted the risks which he had offered, and issued policies in accordance with the applications.

It seems that in this case, Doud applied to the agents sometime in the early part of the month to insure this stock of goods in this saloon and the fixtures. Doud represented to the plaintiffs that he could place the insurance in one of two companies, the Republic or Andes, but after some conversation plaintiff concluded to accept a policy in the Andes. An application was made out,—whether at that time or at some subsequent time is not clearly disclosed by the testimony,—according to the due course of business, for an insurance in the Andes, and was presented to that company, a policy being issued and given to Doud, who brought it to the plaintiff and left it with him, stating that he would want the money within thirty days; and as the testimony of Cahill shows, some short time afterwards, and before the expiration of the thirty days, Doud again called upon the plaintiff and stated that he must have the money upon that policy, the amount of the premium being twenty dollars, and stating that if it was not paid the policy would be canceled. The plaintiff handed Doud the money and retained the policy. Some weeks afterward, the plaintiff, meeting the general agent of the defendant on the street, was notified that this premium had not been paid, whereupon he narrated the circumstance

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of having paid it to Doud. The agent refused to recognize that as a payment, but said that Doud had died or run away, and he could not treat it as a payment, but should cancel the policy, and subsequently, on the 27th of April, 1871, Mr. Ryan, the Chicago agent of the company, addressed this note to Cahill, which seems to have been received by him:

THOMAS CAHILL, Esq., 176 Washington Street.

DEAR SIR: Owing to the non-payment of the premium of your policy in the Andes Insurance Company of Cincinnati, No. 5,829 is hereby canceled and void. We are sorry to be compelled to do so, but we cannot wait any longer for the money.

Respectfully yours, etc.,

E. E. RYAN, Agent.

The policy which was issued, being in the ordinary form then in use by that company, contained this clause:

"If, during this insurance, any subsequent insurance should be made upon the property insured, * * * * or if the company shall so elect, it shall be optional with the company to cancel this policy, which shall cease on notice being given to the assured, or his or their representative, of its decision to do so; in which case the company will become responsible to refund the premium for the unexpired time on demand, and pay the same on the surrender of policy.

No insurance, or renewal thereof, shall be considered binding until the actual payment of the premium."

The question then resolves itself back into the original issue. Was the premium in this case properly paid? If it was, then the policy was in force, and defendant had no right to cancel it for the non-payment of the premium, and if they did seek to cancel it for any other reason than the non-payment, they should have notified the policy-holder. They had no right to claim the right of cancellation broadly, and assign any reason they saw fit afterward. They should put him on his guard and must be bound by the reason they assigned, which was that, the premium not being paid, they refused to be held any longer by the policy.

If the assumption contained in this letter was false, then

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the policy still remains in force, and this claim of cancellation goes for naught. If the assumption was true, that this premium had not been paid properly so as to bind the company, then the claim of cancellation on that ground was well taken.

It is claimed that this policy was issued on the application of Doud, and handed to Doud, who delivered it to the plaintiff. I instruct you, as matter of law, that if you shall find, that by delivering the policy to Doud the company made Doud its representative and agent for the purpose of delivering the policy, and that the delivery of the policy to him, to deliver to Cahill, authorized Doud to receive the premium on the policy, and if Doud subsequently acted dishonestly with the company, and failed to pay over the money to them, they must suffer the loss rather than the party who has acted in good faith. When Mr. Doud brought the policy to Cahill, the natural presumption would have been that he was authorized to receive the premium on the policy, and that the policy took effect as though he was, although there is a clause in fine print in the policy which reads in effect that the policy shall not take effect until the premium is actually paid; for if parties see fit to give credit, and a party is misled by supposing that credit is given to him, I think that clause would cut no figure.

It is true the testimony discloses that Doud was not in the employ of defendant, but in each specific case where he obtained the assent of parties to accept insurance in the Andes Insurance Company, and they issued the policy and entrusted him with it, he became the representative of that company, as between the insurer and insured, for that specific transaction. He may not have been generally, but in that case he is their representative, and the payment of the premium is a good one. There is no question but, if Cahill had gone to the office and had paid the twenty dollars at that time, it would have been a good payment. The only question is, if Doud came at a subsequent day and asked for the money, was

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plaintiff bound to see to the appropriation of the money? I think he was not.

Verdict for plaintiff, one thousand dollars and interest.

If the notice or preliminary proofs are imperfect or informal, all objection may be waived by the insurers; and they will be held to have made such waiver by acts or conduct which authorized the insured to believe that the insurers were satisfied with the proof they had received, and required, nothing more, 2 Parsons on Contracts, 461, and cases collected and cited in note (5th Ed).

See further that a distinct refusal to allow the claim on grounds other than the sufficiency of the notice is a waiver of notice or preliminary proof and an excuse for not furnishing it. *Vos vs. Robinson*, 9 Johnson, 192; *Aetna Fire Insurance Co. vs. Tyler*, 16 Wendell, 385, 401; *Mc Masters vs. Westchester County Mutual Insurance Co.*, 25 do., 379; *O'Neil vs. Buffalo Fire Insurance Co.*, 3 New York, 122; *Clark vs. New England Insurance Co.*, 6 Cushing, 342; *Boynton vs. Olinton and Essex Mutual Insurance Co.*, 16 Barbour, 254; *Franklin Fire Insurance Co. vs. Coates*, 14 Maryland, 285; *Firemen's Insurance Co. vs. Crandall*, 33 Alabama, 9.

Upon the furnishing of proofs, all objections that might be and are not taken, if the company objects to paying will be considered waived. *Peoria M. & F. Insurance Co. vs. Lewis*, 18 Illinois, 553; *Great Western Insurance Co. vs. Staaden*, 26 do., 360; *Hartford Fire Insurance Co. vs. Walsh*, 54 do., 164; *Dohn vs. Farmers, &c., Insurance Co.*, 5 Lansing, 275; *Globe Insurance Co. vs. Boyle*, 21 Ohio State, 119; see also, *Oushan vs. Northwestern National Insurance Co.*, post p. 506.—[Reporter.

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In re ERNST BRANDT.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—DECEMBER, 1872.

IN BANKRUPTCY.

1. RENTS AND PROFITS OF WIFE'S REALTY.—In Illinois, since the Act of 1861, where real estate is conveyed by the husband to a third party and by him to the wife, without consideration, the rents and profits still belong to the husband.

2. Property so conveyed is not acquired by her from a "person other than her husband" within the meaning of the Act of 1861.

3. CONVEYANCE SHOULD EXPRESS SEPARATE USE.—In order to fully protect the wife's rights in property conveyed to her, the deed must indicate the intent to convey to her for her sole and separate use.

4. EQUITY WILL ALLOW SUPPORT TO WIFE.—A Court of Equity will, however, recognize the wife's equitable rights, and if these rents and profits are her only means of support, will allow her therefrom a reasonable support, in preference to the husband's creditors.

Homer Cook, for bankrupt.

Ela & Parker, for creditors

DRUMMOND, J.—This is an application to the court under the second section of the bankrupt law to revise the action of the district court in issuing an injunction against interference with the property of the alleged bankrupt, on the ground that his wife was entitled to the rents and profits of the property.

Although there was a petition to declare him a bankrupt, he has not yet been adjudicated a bankrupt.

The facts, so far as it is material to state them, are that Ernst Brandt, against whom the petition in bankruptcy was

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filed, in March 1871, while free from debt, or rather while free from any of the debts which gave rise to the proceedings in bankruptcy, transferred a lot of land in Chicago to a third person without consideration, in order that it should be conveyed to his wife. The lot was afterwards accordingly transferred to her; and the question made in the case is whether the rents and profits of the property belong to her or to the creditors of her husband.

There was in this case, no declaration, in the deed that the wife was to hold the lot as her separate estate; but it was an ordinary deed from the husband to the grantee, and from the latter to the wife; and unless a different rule prevails where the husband conveys to the wife, directly or indirectly, and it matters not which, from that where another person conveys to her, the husband holds the rents and profits of the land by virtue of his relationship to the wife, *jure uxoris*.

Though a conveyance or gift of real property directly to the wife by the husband may be void at law, I think the authorities are clear that it is a good conveyance in equity, and will be protected by a court of equity. The general rule upon the subject in equity is, as I understand it, that in order to protect the right of the wife to property conveyed to her for her sole and separate use, there must be something in the deed clearly to indicate that intent. Otherwise the law presumes that the general rule prevails that the husband is entitled to the property, by virtue of his relation to his wife, as long as the marriage continues; and under our law if they have children born during coverture, and capable of inheriting, he becomes tenant by the courtesy.

The act of 1861, in relation to married women and their property seems to exclude the wife from the general operation of what is claimed to be a rule existing in other states in a conveyance of property by the husband to the wife, and thereby as stated in the 838th section of the first volume of Bishop on the law of Married Women, "whenever a husband makes a gift to his wife, whether with or without the

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intervention of a third person, who is named as a trustee, she takes a separate estate, since otherwise a transaction which was meant 'to have some effect, can have none in law or equity.'” Now the language of the act of 1861, so far as it applies to property obtained by the wife during coverture, declares in effect that she is only to enjoy it as her sole and separate property, provided she obtains it from a third person. It is this: “which any married woman during coverture acquires in good faith, from any person other than her husband;” and as the expression of one thing may be the exclusion of another, it is a fair inference, I think, that where she acquires property from her husband during coverture, it was not intended to be within the meaning of the law; that is, she was not then to have it as her sole and separate property. And the question is whether in this case she did acquire it from a person other than her husband; and it seems to me that she did not.

She took the deed from another person; but he was only the agent or trustee of her husband to make the conveyance. To all intents and purposes it must be treated the same in equity as though the husband had made a conveyance directly to his wife; and if that were so, then she would be excluded by the terms of the law of 1861. The case will then have to stand on the general principles of law and equity as decided by the courts; and as qualified, possibly, by the statute; because if elsewhere it has been decided that a gift of land from the husband to the wife was good in equity for her sole and separate use simply because it was made by the husband in general terms, yet it looks as though the legislature intended that the rule should be different in this state. I have not been able to examine all the cases that are cited here in note four to the 838th section of Bishop's first volume of the law on Married Women, but still I think that these are the conclusions to be drawn from the authorities and from our own local statute; that in order that the wife shall be entitled to the separate enjoyment of the property owned by her it must clearly

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appear to be an inference from the nature of the case or from the conveyance, and that is not changed whether the conveyance is made directly from the husband to the wife or through the intervention of a trustee. Yet the question still remains, What are the rights of a married woman under such circumstances; and from the examination that I have given to the case I think it is the duty of a court of equity to protect the equitable rights of a married woman in a case like this, where the creditors come in and claim the rents and profits of the property during the life of the husband, or at any rate as long as the coverture exists. There is no question made but that this property, being conveyed to the wife, belongs to her, and, his only right, it is conceded, is by virtue of the marriage relation. I think it is the duty of a court of equity to give her some sort of support out of this property, provided she has no other; and the creditors are not entitled to it all.

It is stated in the 1415th section of Story's Equity Jurisprudence, 2nd Vol., that when the husband comes into a court of equity for relief as to any property which he claims in her right, he will be obliged to submit to the terms of the court, and make a settlement or provision for her. It is stated that the most the court will do under such circumstances is to secure the funds, allowing him, where it is deemed proper, to receive the income and interest.

But where the husband refuses her maintenance or deserts her, the rule, as we shall presently see, is different.

The like doctrine, subject to the like exceptions and limitations, is applied to assignees in bankruptcy, and to other general assignees claiming title under the husband.

And in section 1421, and 1421-a, the case is further stated:

"Let us in the next place consider under what circumstances courts of equity will allow alimony to a married woman.

"The wife's equity already mentioned, as it is ordinarily administered against her husband, or against his particular

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assignee, for a valuable consideration, is by decreeing a settlement which secures to her a provision for her maintenance, commencing from the death of her husband. When the same equity is administered upon a general assignment of his property in bankruptcy, or otherwise, the settlement secures a present and immediate provision for the maintenance of the wife; because the general assignment of his property renders him incapable of giving her a suitable support.

"In each case, the equity is administered out of the equitable funds which are brought under control of the court, and are subject to its order. The object of the court, in each case, is to secure to her a maintenance out of such equitable funds, whenever she stands in need of it.

"So, if it is apparent from the state of the case, that the husband must remain in future without funds to maintain his wife, and there is an equitable fund belonging to her, within the reach of a court of equity, it will decree the income of the whole fund to be applied, primarily, to the maintenance of the wife during her lifetime, and after her death the principal to be divided among her children. Thus if the husband has become insolvent and has taken advantage of an insolvent act, which discharges his person but not his future effects, there a court of equity will secure the whole fund, in the manner above mentioned, for the benefit of the wife and children; for it is apparent that there is no certainty that he can ever have any means of supporting his wife and children. In this respect the case differs from that of a discharge under the bankrupt laws, for in the latter case the future effects of the bankrupt are not liable to his creditors. It is upon this difference that courts of equity will not give the whole fund to the wife and children in case of bankruptcy as they will in cases of insolvency."

Of course we have to act here upon some general rule which shall do equity.

This is a small matter, it is true. As I understand, it is only one lot, and the income of it is not large, and therefore

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perhaps, it is not of much consequence, in one respect. But although it is small, it may be said the wife should have a share, and that the creditors are entitled to only a share, but suppose the case of a very large estate belonging to the wife in this way, and where we will say the husband or may be a tenant, by the courtesy, it becomes a life estate to him. Now if it were the only support of the wife and of the family, and the case coming before a court of equity for its determination, as in this bankruptcy proceeding, to say nothing about the right of the wife to make herself an actor in the case, to say that where the wife owns property amply sufficient to give her and her children a decent maintenance, it should be all taken away merely because her husband has been improvident, is contrary, it seems to me, to the genius of modern laws in relation to the property of married women, and for my part I am not willing to leave her thus unprovided for under such circumstances, but I should think it my duty as a chancellor, to give her something as a support out of this property, and not to give the creditors the whole.

It may be said it is her property, and justly belongs to her, but of what avail is it to her if she is not to have the use of it? She may live on in poverty, and may die at last merely because she is deprived of this property, and her husband may survive her, and this property may go to him still after her death, or to his creditors. Now my idea about it is that it is the duty of the court to ascertain what is the amount and value of this property, and to give to the wife a certain portion of the income, provided it appears this is her only means of support. If she is amply provided for otherwise that would be a different thing perhaps, but if this is her only means of support, I think she is entitled to have something out of it, and the creditors are not entitled to all.

I shall direct an order to be made to the District Judge to this effect.

In re Farnsworth, Brown & Co.

In re FARNSWORTH, BROWN & CO.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1873.

IN BANKRUPTCY.

BANKER'S LIEN.—A bank holding a customer's demand note has a lien upon the proceeds of drafts delivered to it for collection after the giving of the note, though collected after filing of petition in bankruptcy, and can apply such proceeds upon the note.

H. K. Whiton, for the Commercial National Bank, made the following points, citing the authorities in support of them :

I. The bank had a lien upon the drafts held for collection. *Bank of Metropolis vs. New England Bank*, 1 Howard, 239 ; *Russell vs. Haddock*, 3 Gilman, 233 ; *Rhoades vs. Blackiston*, 106 Massachusetts, 336 ; *Van Amee vs. the President*, etc., 8 Barbour, 315 ; *Davis vs. Bowsher*, 5 Term. R., 488.

II. This was a case of mutual debts and credits, under the 20th section of the bankrupt act. *Rose vs. Hart*, 8 Taunt., 499 ; *Naoroji vs. Chartered Bank*, 18 Law Times (N. S.), 358 ; *Catlin vs. Foster*, 3 Bankruptcy Register, 134 ; *Trader's Bank vs. Campbell*, 14 Wallace, 97.

Cyrus Bentley, for the assignee.

BLODGETT, J. The facts in this case appear to be that on and up to the 18th of December, 1872, the firm of Farnsworth, Brown & Co. were wholesale merchants in the city of Chicago, and in good credit. They kept a bank account with the Com-

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mercial National Bank, of this city, and were in the practice of collecting bills against their country customers by drawing sight or time drafts which were indorsed to the bank and by the bank forwarded for collection to its correspondent nearest the residence of the drawee. When paid, the proceeds were passed to the credit of the firm in its general balance. The firm was indebted to the bank on a demand note for \$5,000. On the 14th of December one of the members of the firm absconded, and the fact became publicly known, and known to the officers of the bank on the 18th of December, and on the 23rd day of December, 1872, a petition in bankruptcy was filed in this court against the firm, on which they were adjudicated bankrupts. Shortly before their failure, but while in good credit, the firm had handed to the bank a number of drafts for collection, on which the bank collected, after the filing of the petition in bankruptcy, the sum of \$1,200, and the point raised is, whether the money so collected can be applied by the bank toward the payment of the note held by the bank against the firm, or whether it must be turned over to the assignee for general distribution.

Although the question is not wholly free from difficulty, I think the weight of authority is in favor of the right of the bank to apply the money so collected, in liquidation, so far as it will go, of its own indebtedness.

It was evidently never intended that the bank should pay over to the firm the specific money collected. The legal title to the money called for by the drafts was vested in the bank, and the proceeds were to go to the credit of the firm. It was a method of giving the firm credit with the bank, and was a transaction which could ripen into a debt or demand in favor of the firm against the bank.

It is said by the attorney for the assignee that the bank was a mere agent of the firm for collecting this money, and that this agency was revoked by the adjudication of bankruptcy, and such revocation relates back to the filing of the petition. But I think that it was something more than a naked agency.

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It was an agency coupled with an interest and duty, and filing the petition in bankruptcy did not suspend or annul the obligation of the bank to use its diligence to collect the money due on those drafts. It does not seem to me that the right of the bank to receive the money on these drafts was suspended by what befell the firm, nor that the character in which they received it was changed.

This claim on the part of the bank, it appears to me, can be sustained on two grounds:

1. Because the law gives a banker a lien on any funds coming into his hands belonging to a debtor.¹
2. Because the transaction shows mutual debts and credits between the parties on which the balance is to be struck.²

See further as to question of adjustment of mutual debts and credits, *Hough vs. The First National Bank of Fort Wayne*, vol. 4 of this Series, p. 249, and note thereto.—[Reporter.

¹ Morse on Banking, 34, *et seq*; 2 Kent's Commentaries, 624, note 2;
² Story's Equity Jurisprudence, §1253a.

³ Section 20, Bankrupt Act.

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GEORGE A. KIBBE vs. ALFRED THOMPSON AND
JOSEPH H. DANA.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY,
1873.

1 DEFECTIVE DESCRIPTION.—Where a decree of foreclosure does not in terms describe the land, but simply refers to it, and the defendant in ejectment derives title under the decree, it is for the jury to decide whether the land in controversy was that covered by the decree.

2. INDICIA stated by which a decree may be identified as referring to a certain mortgage.

3. DECREE OF FORECLOSURE,—is a judicial finding of default in payment, and the mortgagee has thenceforth the right of entry for condition broken.

4. The equity of redemption of infant heirs under this decree was barred in one year after they became of age.

5. ENTRY ON CONDITION BROKEN.—The grantees of the heirs of the mortgagee have the same right as the mortgagee to enter the mortgaged premises for condition broken.

6. LAPSE OF TIME—does not raise the presumption of payment if proceedings have been taken to foreclose the mortgage, or if the mortgagor and his heirs have never resided within the state.

Ejectment for the recovery of the Northwest quarter of section 11, township 14, north of range 8, east of 3d P. M., situated in Bureau county, in this district.

William C. Goudy and R. K. Turner, for plaintiff.

George O. Ide and T. G. Frost, for defendants.

The fact that the mortgaged lands are not specially described in the decree does not affect the jurisdiction, if the lands can be identified by extrinsic evidence. *Zimmerman vs. Zimmerman*, 15 Illinois, 84; *Bellingall vs. Duncan*, 3 Gilman, 477-481.

The jurisdictional facts as to who were the parties and

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what the subject matter was, may appear from different parts of the record, and in any part. *Galena & C. U. R. R. Co. vs. Pound*, 22 Illinois, 399, 415 ; *Shute vs. C. & M. R. R. Co.* 26 do. 436.

At law in Illinois, the mortgagee is the owner of the fee and can bring ejectment, or if in possession defend under the mortgage as a muniment of title. *Carroll vs. Bullance*, 26 Illinois, 9, 17.

The legal title of the mortgagee at his death descends to his heirs, and they or their grantee can defend or sue under the mortgage. *Brown vs. Mace*, 7 Blackford, 2.

The limitation laws of Illinois of 1827 do not bar the mortgagee's right of entry, when neither the mortgagor nor his heirs ever resided in the State. *Chenot vs. Leferre*, 3 Gilman, 637 ; *Vallandigham vs. Huston*, 4 Gilman, 125, 128.

No presumption of payment of the debt from the lapse of twenty years arises, where neither the mortgagor nor any one claiming under him has been in possession, and the land has been vacant and unoccupied. *Moreau vs. Detchemenly*, 18 Missouri, 522 ; *Chouteau vs. Burlando*, 20 Missouri, 482 ; *Brobst vs. Brock*, 10 Wallace, 519, 534.

Even though the mortgage may have been paid, the defense can be arrested only in equity and not in ejectment. *Brobst vs. Brock*, 10 Wallace, 519.

BLODGETT, J.—The plaintiff claims to derive title from the United States by the following chain of conveyances.

First: A patent from the United States to David Leighton, dated August 5, 1818, conveying the land in question to the said Leighton for his service as a soldier in the war of 1812.

Second: A deed from Leighton to John B. Abbott, dated September 20th, 1818, conveying the land in question to Abbott.

Third: A power of attorney from John B. Abbott and others to Abraham Beck, of St. Louis, Missouri, authorizing

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him to sell and convey any land which he (Abbott) had in the State of Illinois; a warranty deed from John B. Abbott, by Beck, as his attorney in fact, to William M. O'Hara, dated September 12, 1820, conveying the land in question, and recorded in Pike County, in this State, May 9th, 1821.

Fourth: A deed from Abraham Harrel and Helen O'Hara Harrel his wife, to the plaintiff, dated May 2d, 1868, conveying all lands in the State of Illinois in which Mrs. Harrel had any title or interest.

Fifth: The plaintiff also puts in evidence a deposition made in this case by Mrs. Helen O'Hara Harrel, in which she testifies that she is the sole child and heir-at-law of William M. O'Hara, formerly of St. Louis, and who is the grantee in the deed of September 12th, 1820, from Abbott.

It is admitted by the defendants that this chain of conveyance makes a *prima facie* case for the plaintiff; and that the plaintiff will be entitled to a verdict at your hands unless the title set up by the defendants shall be held to be the paramount and better legal title as against the plaintiff's claim.

The title thus set up by the defendants consists of a mortgage bearing date April 13th, 1821, given by William M. O'Hara and Susan his wife to John P. Cabanne, of St. Louis, Missouri, of sixteen quarter sections of land in the military tract of Illinois, among which is the land in question, to secure the payment of three promissory notes for \$1,697.78 each, dated on the 9th, day of September, 1820, and payable in seven, ten, and twelve months after date.

And also a decree by which it is claimed that the equity of redemption of the said mortgagor was foreclosed, entered in the Circuit Court of Pike County in this state at the October term of said court for the year 1822.

Second: A deed from the heirs-at-law of John P. Cabanne to John P. Sarpey, dated January 28th, 1854, conveying the land in question, with other property.

Third: A deed from John P. Sarpey to Lucien D. Cabanne, dated March 19th, 1855, conveying the same land.

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Fourth: A deed from Lucien D. Cabanne to the defendants, dated April 18th, 1856, conveying to them respectively to one the east half, and the other the west half, of the quarter section in question.

The defendants also put in evidence a tax deed by the Sheriff of Bureau county to the defendant Thompson, dated February 9th, 1850, for the whole quarter, and a deed from Thompson to Dana of the half of this land claimed by Dana.

It is admitted that the defendants took possession of the land in question some time in 1857 under the tax deed, and have continued in actual possession ever since, and that since they have so been in possession they have paid the taxes on said land and have claimed title under said tax deed; and since the deed from Lucien D. Cabanne they also claim title under the Cabanne deed.

As explanatory and auxiliary to this mortgage and decree, the defendants also offer in evidence another mortgage, dated September, 1820, from William M. O'Hara and Susan his wife of St. Louis, Missouri, to John P. Cabanne, to secure three notes of the same amount, made by O'Hara and Collett, the makers of the notes described in the other mortgage, upon fifty quarter sections of land in the State of Illinois, between the Illinois and Mississippi rivers; and also certain orders made by the Pike County Circuit Court at the April and October terms, 1822, and April term, 1823, in the said foreclosure suit and other suits pending in that court.

The object of this testimony was twofold:

First: To show that the Pike County Circuit Court had jurisdiction of the persons of the defendants in said suit, and,

Second: To identify the tract of land in question as part of the property affected by said decree.

The first question, that of jurisdiction, was one of law for the court; and as I have already told you, I am satisfied that the record of the proceedings of said court, when all taken together, showed jurisdiction in that court to enter said decree,

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and that the same is binding upon the children and heirs-at-law of William M. O'Hara, who was then deceased.

The several questions as to how far the evidence adduced identifies the land in question with the said judicial proceedings, is one of fact to be determined by the jury; that is to say, does it appear as a matter of fact that the decree of foreclosure in the case of *John P. Cabanne vs. Susan O'Hara and others*, entered at the October term, 1822, of said Pike County Circuit Court, included and was intended to apply to the land now in controversy? Or, in other words, were those two mortgages the subject matter of that decree? If they were, then the land in controversy was included in the decree, because one of the mortgages (that of April 13th, 1821) specifically describes and covers this land. The decree does not in terms describe the land; but there is a well-known rule of evidence often invoked and applied in construing deeds and judicial proceedings, that that is certain and definite which refers to matter by which it can be made certain and definite. It must be obvious to you that unless the land to be affected by the decree is described fully and clearly in the decree itself, or unless the decree makes reference to something outside of itself, by reference to which we can ascertain what land is meant, the decree must be held void for indefiniteness.

It will be important for me to call your attention to some of the indicia by which it is claimed by the defendants that the connection between this decree and the mortgage of 1821, which covers the land in question, is made out.

First: The foreclosure is of two mortgages covering sixty-six quarter sections of land. The two mortgages were given by O'Hara and wife to Cabanne, and were upon an aggregate of sixty-six quarter sections; one being of sixteen quarter sections and the other of fifty quarter sections.

Second: The amount found due by the said decree on the said two mortgages is nearly the amount which would have

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been due on the two mortgages offered in evidence; that is, if they were both given to secure the same debt.

Third: The said William M. O'Hara's wife's name was Susan, and this suit is against Susan O'Hara, widow of William M. O'Hara, deceased, as well as the children and heirs-at-law of the said William M. O'Hara. The proof by both parties shows that the said William M. O'Hara was dead at the time these proceedings were taken in this suit.

Fourth: That there were infant defendants, and the said O'Hara had children who were then infants and would have been necessary parties defendant to the said suit to foreclose this mortgage.

Fifth: That the said suit was against the widow and heirs-at-law of William M. O'Hara, and all the defendants were non-residents; which corresponds with the condition of the O'Hara widow and heirs at this time.

If, then, from these indicia which I have suggested, and any others which may occur to your own minds from the evidence, you are satisfied that the land in question was one of the sixty-six quarter sections described in the said decree, then I instruct you:

First: That the said decree is a judicial finding that default had been made in the payment of the indebtedness secured by said mortgage of April 13th, 1821, and Cabanne and his heirs had thenceforth the right to enter on the premises for condition broken against the heirs of O'Hara and those claiming under them.

Second: That the equity of redemption of the O'Hara heirs was cut off and foreclosed by said decree, unless they showed cause against said decree within one year after they severally arrived at the age of twenty-one years, which time has elapsed, and there is no evidence that they offered to show such cause, and their equity of redemption being thus cut off, said O'Hara heirs, or the plaintiff, who is the grantee of said heirs, has no legal title in said land, and at most has only an equitable right to redeem through a court of chancery.

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Third: I further instruct you that after the breach of the condition of said mortgage, by failure to pay the indebtedness secured, the legal title to said land, together with the right of the possession thereof, thereby, vested in the said Cabanne, and he, or his heirs, had the right to enter into such possession of the mortgaged premises, and that the same right inures to the grantees of the heirs of the said Cabanne; and that the deeds introduced in evidence by the defendants, from the Cabanne heirs to Sarpey, and from Sarpey to Lucien D. Cabanne, and from Lucien D. Cabanne to the defendant, show a legal title under said mortgage in the defendants paramount to the title adduced by the plaintiff.

It is objected on the part of the plaintiff, that from the lapse of time it must be presumed that this mortgage has been paid; and that the defendants can therefore assert no right to possession under it. That might be true perhaps, if no proceedings had been taken to foreclose the mortgage; but upon the view which I have taken in regard to the validity of the record of foreclosure, I think that Cabanne and his heirs or their grantees cannot be presumed to have received payment of this debt; but that the affirmative of that fact must be established by the plaintiff if he would defeat the decree entered.

I further instruct you upon this point that such presumption does not arise in this case if you shall be satisfied from the evidence that said William M. O'Hara and his heirs had never resided in the State of Illinois so as to become bound by the limitation laws of this state.

The jury brought in a verdict of not guilty.

GEORGE A. KIBBE vs. AMOS DUNN.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS.—APRIL,
1873.

1. DECREE—PRESUMPTION.—If a decree of foreclosure shows that the court was apprised of the existence of infant heirs-at-law, and took measures to preserve their rights, the legal presumptions in favor of the validity of the decree are not limited by the production of the bill in which the names of such heirs are not given, but process is prayed against them generally.

2. INTENDMENT—JURISDICTION.—The rule of intendment in favor of titles derived under judicial proceedings is, that the court will presume every act or thing to have been done, necessary to confer jurisdiction, which the record does not show was not done—particularly when the record produced shows that the whole record and proceedings have not been preserved. This rule should be enforced in all its liberality where parties have slept upon their rights.

3. The grantee of the mortgagee in possession must prevail in an action of ejectment brought by the mortgagor after condition broken.

Wm. C. Goudy and R. K. Turner, for plaintiff.

T. G. Frost and Geo. O. Ide, for defendant.

Jurisdiction is presumed in a court of general jurisdiction in the exercise of its general chancery powers, though the record may not affirmatively show the facts necessary for jurisdiction. *Kenney vs. Greer*, 13 Illinois, 432-448; *Ralston vs. Hughes*, 13 do., 469-477; *Pensoneau vs. Heinrich*, 54 do., 271; *Harvey vs. Tyler*, 2 Wallace, 341-328.

A judgment is not void because a defendant is sued only by a part of his name. *Hammond vs. People*, 32 Illinois, 446-472.

The loss of the files in a case does not affect the title of a purchaser if the decree recites jurisdiction. The court will presume that proper papers were filed. *Miller vs. Handy*,

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40 Illinois, 448, 452; *Secrist vs. Green*, 3 Wallace, 744-755; *Moore vs. Neil*, 39 Illinois, 256-261.

Independent of the decree of foreclosure the defendant is entitled to judgment, as he held the paramount title. He occupies the position of mortgagee in possession and, as between the mortgagor and mortgagee, the latter, after condition broken, is entitled to prevail in an action of ejectment. The presumption of payment of the mortgage is completely rebutted by the absence of the mortgagor from the state, and the attempt by public judicial proceedings to foreclose the mortgage and to collect the mortgage debt. Even were it otherwise, the result must be the same. The remedy of the mortgagor would be by a bill in equity to redeem, not by an action of ejectment.

HOPKINS, J., after relating the facts and charging the jury as to the main issues substantially the same as BLODGETT, J., in the preceding case, *Kibbe vs. Thompson*, ante p. 226, and also to the effect that, regardless of the decree offered in evidence, the defendants as mortgagees in possession were entitled to prevail, further instructed the jury as follows on the only phase of the case different from that one.

The record produced in the case of *Kibbe vs. Thompson* and other cases, tried before Judge Blodgett, was imperfect. It was apparent that it was not all preserved. It did not show affirmatively that the heirs-at-law of the mortgagor were made parties; but it did not show that they were not. The court, therefore, in order to support the decree, supplied by intendment several material and necessary facts which ought to have appeared in the record, and held that it lawfully might do so.

The main question to be considered and decided in this case is, does the production here of the bill materially change the case, or in any way affect the authority of the court to supply, by presumption, the omissions in the record, which the court in those cases did supply by presumption; for, if it

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does not, the decision in this case should conform to the decision in those.

In the record, as used in those cases, the heirs-at-law of the mortgagor were not named, but the court, from the title of the case in certain orders, and from the manner in which the parties were designated in the decree, presumed that they had properly been made parties in the case, and duly served with process, so as to be bound by the decree.

In this case the bill is given in evidence, and they are not named otherwise in it than in those orders. The parties named in the bill are Susan O'Hara and the children and heirs-at-law of William M. O'Hara, deceased, and process is prayed against them.

Does that limit the right of the court to presume that they were not subsequently made parties in a proper manner, as was done in the other cases? I do not think it does.

The right of the court to infer that those heirs were before that court in some proper manner, is greatly strengthened by the clause in the decree, showing that the court was advised of their infancy, and by the proper and apt words inserted in the decree, preserved their rights by giving them time for redemption after they arrived at majority. It conclusively appears, from such clause, that their interests were considered and their infancy established, and it would seem strange that all this was done and the court not apprised of their names.

I think, in view of these facts, and the great length of time that had elapsed before asserting any right to the property, or denying that they were properly brought into that case as parties, this court is justified in presuming, in support of that decree, either that the bill was subsequently amended, and lost from the files, or that an order to amend was made and not preserved, or, that under the prayer, the court, before making an order of publication, ascertained their names, and had them properly inserted therein, and afterwards proceeded regularly in the case, as against them—as held in the other cases.

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If their names were ascertained and inserted in the process or order of publication, without amending the bill, it would only be an irregularity, and not affect the jurisdiction of the court.

So I do not see that the bill has materially changed the case, or has affected the right of the court to indulge in this case the same presumption as it did in the former cases.

The rule deducible from the cases, on the question of indentment and presumption in favor of titles derived under judicial proceedings, is, as I understand it, that the court will presume every act and thing to have been done, necessary to give jurisdiction and authority to the court pronouncing the judgment or decree, which the record does not show was not done,—particularly, when the record produced shows that all of the record and proceedings have not been preserved.

And the application of that rule in all its liberality, in cases like this, where the parties have slept upon their rights for over half a century, should be enforced. Courts should, if possible, under the rules of law, sustain titles derived in that way, and prevent speculators from interfering to disturb peaceable and quiet possession resulting from occupations under such titles.

I therefore decide that the decree in the Pike County Circuit Court, given in evidence, and the sale under it, extinguished the right of the defendants thereto—the heirs-at-law of William M. O'Hara, under whom the plaintiff in this case claims.

Verdict for defendant.

JAMES PULLAN, TRUSTEE, &C., vs. CINCINNATI
AND CHICAGO AIR-LINE RAILROAD CO., ET AL.

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY TERM, 1873.

IN EQUITY.

1. EARNINGS OF RAILROAD COMPANY—BASIS OF COMPUTATION.—Where under a decree of foreclosure against a railroad company, reference had been made to a master to ascertain the gross earnings and expenses of a certain section of the road covered by a mortgage, it is not an erroneous principle for the master to make a *pro rata* estimate of the earnings and expenses of the whole road, it being shown before him that such section had not been operated separately, but as a part of the whole road, and no separate accounts kept of the income or expenses of any particular part. Though such a rule leads not to actual results, but to approximation merely, it is the best which could be adopted.

2. WHEN COMPANY ESTOPPED BY NEGLECT.—The railroad company cannot complain of the adoption of this rule where it was under a legal obligation to keep separate accounts of such section, and where it was by its own neglect that such separate accounts were not kept.

3. MORTGAGE MAY COVER FUTURE EARNINGS—EQUITABLE LIEN.—Notwithstanding the general rule that the mortgagor, until some action by the mortgagee, is entitled to the earnings and profits of the mortgaged property, it is competent for the parties to agree in the mortgage that such future earnings and profits shall be held in equity by the mortgagee, and under such a contract, such income whenever received is operated upon by the mortgage, and the party receiving it holds it in trust for whoever is in equity entitled to it.

4. WHEN MORTGAGOR CHARGEABLE AFTER ORDER TO SURRENDER.—Such a mortgagor remains chargeable with the income, even after he has offered in open court to surrender the property to the mortgagee. The mortgage only took effect upon the income when earned, and as long as the mortgagor operated the road and earned income, he could not avoid his responsibility for it. The only valid answer would be either that he did not operate the road, or that there was no income earned.

5. MASTER'S ESTIMATE—CONDUCT OF OBJECTOR.—Though an estimate by the master may not be entirely satisfactory to the court, if there is evidence which seems to justify him in his conclusions and the party object

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ing did not furnish the master with evidence of any other state of facts, nor give him the proper assistance, the court will not usually interfere with the master's report on that ground.

6. WHERE HIGHEST ESTIMATE ADOPTED—BURDEN ON OBJECTOR.—Where under conflicting evidence the master had placed the highest estimated value upon property, the court will not set aside the master's report in this respect, unless there are circumstances in the case which show that the evidence fixing the lower value was more entitled to credit, and it is the duty of the party making the exception to satisfy the court that the report is wrong in this respect.

7. RENT OF ROLLING STOCK.—Eight per cent. is too low a rent for the use of rolling stock, where the owner bore all the loss and deterioration.

8. MORTGAGOR OF PART—WHERE WHOLE INTEREST MAY BE BOUND.—*It seems*, that although the mortgage only covered this one section, when a subsequent mortgagee in possession operated the whole road as an entirety, and had kept no separate account of that section, but mingled the earnings of the whole road, his whole interest in the road would be equitably bound for the amount of income.

9. Previous to the entering of final decree, any interlocutory decree is subject to examination and modification.

This was a bill of foreclosure filed by James Pullan, successor in trust to George Carlisle and Joseph B. Varnum, against the Cincinnati & Chicago Air-Line Railroad Company and numerous other parties in interest to foreclose a mortgage given February 25, 1852, in the form of a deed to trust, by the New Castle & Richmond Railroad Company, to secure its bonds to the amount of \$300,000.

The present questions came up on exceptions to master's report.

The facts and proceedings in the case are fully stated in the opinion.

Tilden & Osgood, Tilden & Shroder, J. E. Stevenson, and Wm. B. Pullan, for complainant.

The efficacy of the clause to convey future income will not be now questioned. Since *Legard vs. Hodges*, 1 Vesey, Jr., 477, no lawyer has doubted the correctness of the principle.

From the nature of the case, the subject of the conveyance, *i. e.* the income, is not *in esse* at the time of the conveyance,

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so that at law it can not take effect; but in equity, it is treated as a valid contract, and takes effect as a present conveyance as soon and as fast as it comes into *esse*, and operates to transfer the absolute interest, or by way of trust, or to create a lien, according to the intention of the parties. 2 Story's Equity Jurisprudence, § 1231; *Abbott vs. Goodwin*, 20 Maine, 408; *Mitchell vs. Winslow*, 2 Story, 630, 644; *Legard vs. Hodges*, 1 Vesey, Jr., 477; *Collyer vs. Fallon*, 1 Turner & Russell, 459; Perry on Trusts, §§ 759, 761, 762.

1. It must be premised, as a matter of fact, that the Air Line Company, the accounting defendant, has, pending this suit, transferred its rights, and that other corporate organizations have successively been interposed, and have received the income of which the complainant is in pursuit. But all were assignees and purchasers *pendente lite*, and will, of course, be bound by any decree which may be rendered in the case. Story's Equity Pleadings, §§ 156 and 351, and many decided cases.

2. The complainant would be authorized, if he thought proper, to resort to that remedy, and to file a supplemental bill against these *pendente lite* purchasers, and obtain against them a personal decree, and this remedy is distinctly affirmed in *Minnesota Company vs. St. Paul Company*, 2 Wallace, 609.

3. But there is another remedy better adapted to the case, and which it is believed may properly be applied.

The property of a corporation, of whatever it may consist, and whether the corporation is dissolved or *in esse*, or insolvent, is, in equity, a trust for the payment of its debts; and this trust raises a lien which will be enforced specifically, by proceedings *in rem*. No voluntary act of the corporation, done after it has ceased to act as such in the usual way, or of an insolvent corporation, will divest that lien. This is a familiar doctrine of equity, and abundantly sustained by the decisions of the American courts. Angell & Ames on Corporations, 477, and cases there referred to.

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As to the right of the mortgagee, out of possession, to demand an account of the income from the mortgaged premises, see *Pardoe vs. Price*, 11 Meeson & Welsby, 427; *Pardoe vs. Price*, 13 do., 267; *Pardoe vs. Price*, 16 do., 451; *Coe vs. Beckwith*, 31 Barbour, 339; *Howell vs. Ripley*, 10 Paige, 43; *Thomas vs. Brigstocke*, 4 Russell's Ch., 64; *Moore vs. Titman*, 44 Illinois, 367.

The remedy to which the complainant is entitled:

1. The court may sequester the income of the mortgaged property, and direct it to be applied to the mortgage debt until paid.

2. The court may order a foreclosure of the equity of redemption, and a sale of the mortgaged property. In this case the court had the power to decree a sale of the corporate property and franchises.

The instrument, although a trust deed in form, was simply a security for money loaned, and in fact, a mortgage. *Coe vs. Johnson*, 18 Indiana, 218; *Coe vs. McBrown*, 22 do., 252; *White Water Valley Co., vs. Vallette*, 21 Howard, 414.

The fact that the mortgage was a railroad mortgage can make no difference with the general rules of law relating to mortgaged property. *Dunham vs. Railway Co.*, 1 Wallace, 254, 268.

The complainant was, after default by the mortgagor, entitled to the possession of the section of the road mortgaged, and to the income thereof, but until he took such possession he was not in a position to ask for or demand an account of the rents and profits, 1 Hilliard on Mortgages, 198; *Fitchburg Cotton Manufacturing Co. vs. Melven*, 15 Massachusetts, 268; *Wilder vs. Houghton*, 1 Pickering, 87; *Higgins vs. The York Building Co.*, 2 Atkyns, 107; *Astor vs. Turner & Skidmore*, 11 Paige, 436; *Howell vs. Ripley*, 10 do., 43; 1 Washburn on Real Property, 532.

E. Walker, *J. E. McDonald*, and *A. L. Roach*, for defendants, filed an elaborate brief citing the following authorities:

In general, the rents and profits of mortgaged premises belong to the mortgagee or his assignee, until a foreclosure and sale. *Bank of Ogdensburg vs. Arnold*, 5 Paige, 38.

And if the real property is insufficient to pay the debt, and the mortgagor is insolvent, the mortgagee can only reach the rents and profits by a proceeding for that purpose, or by a decree and sale of the real estate. *Id.*

If a mortgagee takes possession before foreclosure, he is required to account for the rents and profits. *Van Benson vs. Almstead*, 5 Paige, 9.

The mortgaged premises are in general, regarded as the primary fund for the payment of the debt. *Tice vs. Annin*, 2 Johnson's Chancery R., 125; *McKinstry vs. Curtis*, 10 Paige, 503.

Rents and profits actually received by a mortgagor rightfully in possession, before an order of sequestration is made, cannot be recovered of him, and so of an equitable incumbrancer. 1 Washburn on Real Property, 532; *Clarke vs. Curtis*, 1 Grattan, 289; Coote on Mortgages, 325.

Mr. Washburn also says: "The mortgagor cannot be charged with the rents of the premises before the mortgagee shall have obtained actual possession, even though the premises are an adequate security for the debt, and this extends to the grantee of the mortgagor, and includes rents accruing after the commencement of process to obtain possession. 1 Washburn on Real Property, 549; Coote on Mortgages, 325; *Gibson vs. Farley*, 16 Massachusetts, 280; *Boston Bank vs. Reed*, 8 Pickering, 459; *Hughes vs. Edwards*, 9 Wheaton, 489; *Bank of Ogdensburg vs. Arnold*, 5 Paige, 38; *Grable vs. McCulloh*, 27 Indiana, 472; Edwards on Receivers, 360.

DRUMMOND, J.—In 1848, the Legislature of this State authorized the construction of a railroad from Richmond to Newcastle, a distance of twenty-seven miles.

The act was amended in 1851, by authorizing the extension of the railroad in a northwestern direction to a point on the

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Wabash river, opposite Logansport, and in that way to Lafayette.

The act of the Legislature amending the original charter, required that the accounts connected with the running and construction of the road should be kept distinct, and that when the road was completed it should all be united and constitute one entire railway. In 1852, the road having occasion to borrow some money, executed a mortgage or deed of trust to trustees, of whom Mr. Pullan, the plaintiff, is the successor, to secure three hundred thousand dollars of bonds which were issued and transferred to various parties, who advanced money upon them.

This mortgage described the property as "the present and future-to-be-acquired property of the Newcastle and Richmond Railroad Company, that is to say, the first section from Richmond to Newcastle."

A bill was filed in November, 1864, to foreclose this mortgage,—neither principal nor interest having been paid,—and it is for relief under this bill of foreclosure, and for payment of principal and interest of these bonds, that the case has been so long pending in court, and is now about to be finally disposed of.

The Cincinnati & Chicago Air-Line Railroad Company was made a defendant at the time this bill was filed.

Between the date of the mortgage in 1852, and the filing of the bill, there had been other mortgages executed upon the whole property between Logansport and Richmond, and under a foreclosure of one of these mortgages in this court the property was sold subject to the mortgage of 1852. The various parties went into possession, and under this decree and sale the Cincinnati & Chicago Air-Line Railroad Company was holding the property at the time this bill was filed. They, of course, were not bound to pay the three hundred thousand dollars, the debt for which the mortgage of 1852 was given. They had nothing to do with the contract made between the road and these parties (holders of these bonds) other than that

they were in possession of the property which was given to secure the payment of these bonds and interest.

I think this is all that it is necessary to state before coming to what took place in this court at the May term, 1869, under the bill filed in this cause in 1864. Much had occurred during the progress of the case; many orders had been made by the court; and among others, orders requiring separate accounts to be kept and money to be paid into court for the purpose of protecting these mortgages, which orders do not seem to have been in all respects complied with.

At the May term, 1869, Davis J. made an interlocutory decree, which is the foundation of all the questions which arise before me at this time. That decree found that the mortgage of 1852 covered the railroad and its revenues between Richmond and Newcastle, and that the road between these two points, "with the bridges, depots, and other property thereon, with the tolls and income arising therefrom," were within the terms of the mortgage. And the court found negatively that the mortgage did not extend to any other portion of the road, nor were the income and tolls of any other part of the road mortgaged. It found also, as a necessary corollary from this, that the plaintiff was entitled to receive from the defendant nothing more than the net income of the road from Newcastle to Richmond. It also found that the rolling stock which the defendant had purchased from Choteau and others who claimed under the decree and sale under a subsequent mortgage, was in fact equitably owned by the old road, and should be divided ratably between the parties—that is to say, as twenty-seven, the distance between Richmond and Newcastle, is to one hundred and eight, the distance between Richmond and Logansport, or one-fourth of the rolling stock,—and that for one-fourth of the value of the rolling stock at the date of its conversion by the defendant, with interest, the defendant was liable.

The first question arises upon this decree.

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The case was referred to a master and instructions given to him as to his report and the principles which should govern his calculation. He has made his report, exceptions have been filed and argued, but the plaintiff has claimed the right to question one of the points found by the court in its interlocutory order of May, 1869, and it is the undoubted right of the plaintiff so to do. Until the case is finally disposed of by the chancellor, any interlocutory order made during the progress of the case is subject to modification.

This order made in May, 1869, was only an interlocutory order and it is therefore within the rule. It is claimed on the part of the plaintiff that the order made at that time by the court, declaring that the mortgage only covered that portion of the railroad between Richmond and Newcastle, was erroneous, for the reason that the statute amending the charter and authorizing the extension of the road to Logansport obviously contemplated that there was to be one entire road; that separate accounts were to be kept, and that when it was completed, the road was a whole, and was not therefore separable into distinct parts, and that *ipso facto* (and not by anything which took place afterwards and by which income was earned by the assignees or vendees under a decree of this court) by the passage of the amendments and the directions of the legislature and the taking possession and completion of the road to Logansport, the mortgage expanded and brought within its grasp the whole road from Newcastle to Logansport as well as that from Richmond to Newcastle.

An argument has been submitted on that point, the strength of which the court feels and admits. But it would have to be a very clear case—one about which no doubt could be entertained—to warrant the court in the present aspect of the case in interfering with the order made at the May Term, 1869.

If the case is doubtful it is not the duty of the court to modify or change that part of the decree, and on looking at it, I am not satisfied, notwithstanding the arguments which

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have been used, that that portion of the decree is erroneous, and I do not feel at liberty to interfere with it, but think that it ought to stand as the decree of the court and as binding upon the court now. So that we must proceed on the assumption that the mortgage, or deed of trust, only covers so much of the property as was described by the interlocutory order of the May Term, 1869, and consequently we must deny the right of the plaintiff to bring the whole road, that is the one hundred and eight miles, under the mortgage. This is entirely independent of any question which arises in consequence of the defendants receiving income from the road, which depends upon different principles.

There are some principles involved in the master's report which are questioned, and as to which it is the duty of this court to give its opinion. The master, it seems, being instructed by the interlocutory order already referred to, to ascertain the gross earnings of this part of the road from the time the bill was filed, and from its earnings to deduct the expenses, not allowing for permanent improvements which were not required to run the road safely and securely, and being instructed also that a reasonable rent should be allowed for the use of the rolling stock employed in making gross earnings, made a *pro rata* estimate of the earnings and of the expenses of the road in order to reach the result required by the court, viz: the net earnings of the road between Richmond and Newcastle. The objection is made that that principle was erroneous. I am satisfied that it was, under the circumstances, correct, and that no other course could be adopted. I admit that it is a very unsatisfactory mode—that it does not necessarily lead to a true result, but I think it is the only practicable mode by which the master could reach the result aimed at by the court. The reasons for the rule which the master adopted are, I think, satisfactorily stated by him in his report. He says that from the organization of the Newcastle & Richmond Railroad Company, and through all the changes and consolidations, which were numerous, the road from

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Richmond to Newcastle has been operated and used, and is now operated and used, and the income received, and the operating expenses paid as a part of the entire road; that no accounts were made or kept showing separately the income or operating expenses of any particular part, and that the income of this part has been blended with the income of all the other parts of the several lines of road of which it formed a portion, and that the operating expenses have in like manner been paid out of the common fund produced by the use of the various parts. Now, under such circumstances, it is difficult to see how the master could adopt any other rule than he has adopted, admitting that this rule leads not to actual results, but to an approximation merely.

Its soundness will be further illustrated by the legislation connected with this railroad. It was obviously intended that the accounts should be kept separate until the road was finally completed to Logansport, so that it should be known precisely how much each part cost, both in construction and in operation. This was a law that stood directly in the path of all these parties, individual and corporate, who were in possession or who came into possession of this railroad. It was a rule for their conduct which was disregarded by them, and I do not think that it is competent for them to complain if the *pro rata* estimate is now adopted for the purpose of ascertaining the net income of the road between Richmond and Newcastle. It is something that grows out of their own fault, with which the mortgagees under the mortgage of 1852 had nothing to do, and for which they can not justly be held responsible. This disposes of the first, second, third, fourth and eighth exceptions that have been taken to the master's report, and they are overruled, because they all proceed upon the ground that the master erred in adopting that rule for the purpose of ascertaining the net earnings of the road between Richmond and Newcastle.

Another objection is, that the earnings of the road should

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be taken into account from the time that the Cincinnati and Chicago Air-Line Railroad Company went into possession of the road, July 1, 1860.

The interlocutory order of May, 1869, declared that the plaintiff was entitled to the net income of the road for the twenty-seven miles, from the date of the filing the bill, namely, from November, 1864. It does not appear why that time was fixed on by the court. It may have been on the ground that the court would hold a party in possession for the net income of the road from the time that it should be considered a demand was made for the earnings and income. However that may be, the court at the May term, 1872, modified the order which was originally given to the master, and authorized him to take an account of the earnings of the road from the 1st of July, 1860, leaving the parties to the equities which might arise in reference to that modification of the order, it obviously being the intention of the court to leave the question open for the decision of the court at this time; and that, therefore, is the question which now arises: What is the true construction of the language in the mortgage,

“The present and future-to-be-acquired property of the Newcastle and Richmond Railroad Company; that is to say, the first section from Richmond to Newcastle.”

The property and the future-to-be-acquired property, and income of the road were mortgaged. I think that the mortgagees were entitled to the income of the road as soon as it came into existence as property.

This question is quite important, because I believe the net earnings, between the time the defendant took possession, on the first of July, 1860, up to the time of the beginning of the suit, as found by the master, amount to ninety-five thousand and three hundred and forty-four dollars and eight cents (\$95,344.08). It is in relation to the principle which we are now considering that the fifth exception by the defendant is made to the master's report.

It is claimed that the general rule is—and there is no con-

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troverting the position in case of an ordinary mortgage—that the mortgagor, until he is interfered with by the mortgagee, has the right to the earnings and the profits of the mortgaged property; that any income derived from it becomes the property of the mortgagor; that in point of fact, the mortgagor cannot mortgage, and does not mortgage, what is not *in esse* at the time he executes his mortgage.

The rents, profits and income, is something that arises in the future. It is claimed that it is not possible for the mortgage to cover what is only to be brought into existence after its execution. There is no disputing this general rule. But the question is whether parties cannot agree that as soon as property does come into existence in the future, that property shall be seized by virtue of the contract and held in equity for the fulfillment of the obligation of the mortgagor, and I think it can be, and that when the income of this property came into being, that is to say, as soon as it was received, then the mortgage operated upon it by virtue of the contract which was made between the parties; and whoever received the income, received it and held it in trust for the party who was entitled to it. I do not see how this differs from the principle declared by the Supreme Court of the United States, in the case of *Coe vs. Pennock*, 23 Howard, 117. The question there was whether property which was acquired after the mortgage was executed, became the property of the mortgagees as against subsequent creditors, and the court held that it did. That was a case where locomotives and cars were constructed and put on the road after the date of the mortgage, and it seems to me that the principle operates in this case with peculiar force, because these parties took possession of this property with the knowledge of the contract which was in existence.

It was on the face of the decree under which they claimed. They could no more get rid of it, or of its binding effect in equity, than they could of any other fact set forth in the title under which they held.

The decree of this court was the foundation of their title

and is to-day the only one, as far as this court knows, upon which that title depends, and that declares they took the property subject to this mortgage. Then I hold that the parties who have knowledge of this—and they must be presumed to have—as soon as they received the income of this property, held it for the benefit of those who were protected by the mortgage of 1852. And these circumstances furnish an additional reason why it was obligatory upon them thus to discriminate, so as to know what the expenses and earnings were upon this particular section of the road. But it is said by the defense that however this may be, the defendant certainly would not be chargeable with any income after it offered to deliver up, in open court, and surrender to the plaintiff the property of which it was in possession, and the only property, as it insists, that was covered by the mortgage. The answer to this is, that as to the income there was no mortgage upon it, and no trust unless it was earned. If they operated the road and earned income, they could not, of course, avoid the responsibility growing out of these facts. The only answer that they could have made would be that there was no income earned, or that they did not use the road.

It is objected that the percentage of expenses of the gross earnings of the road, as established by the master in his report, is too small; that was fixed at sixty-three and three-tenths per cent., and it is in relation to this that the court has had the most difficulty.


I have an impression, I may as well state frankly, that this percentage is not large enough; but I have examined very carefully the report of the master, and the reasons he gives for fixing upon this percentage, and I cannot say that the proof does not warrant it. It is claimed that the master took the gross earnings of the road from the books of the defendant, but did not take the expenses from the same source; and it is insisted, and with some considerable plausibility, that having gone to one source of information for the earnings, and the same source furnishing the expenses, that he should

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not have taken the account of earnings without also having taken that of expenses.

But he says that in the expenses there were included other items than the mere running expenses of the road, which he thought it was his duty alone to consider; that the construction account included in it various other things, all of which went to make up the sum total of the expense account, and as to which he could not discriminate.

I may add that in some instances it is stated by the master that at a particular time, which he gives, the expenses of the road were, in one case, over ninety per cent., and in another, eighty-two per cent., and it is claimed that he ought to have taken this during that time to determine the running expenses; but he has given the reason why it was not done, and while I am not entirely satisfied that this percentage is large enough, still I do not see anything in the case that warrants the court in interfering with the report of the master on that ground. I can not say but what there is evidence in the case that may justify him in his conclusions; and I think, perhaps, there may be some complaint made that all the light that could be thrown on this subject was not furnished by the defendant, but that the master was left to grope in the labyrinth of accounts, without the assistance which might have been rendered. I do not know that this is actually true, but there is something that seems to indicate it.



Observations of a somewhat similar character may be made to the objection taken to the account furnished by the master as to the value of the rolling stock which was turned over to the defendant at the time it took possession under Choteau and others.

The master states the circumstances connected with this part of his report. He says that the testimony as to their value was conflicting, and that he was obliged to form an opinion somewhat from the value of such articles, as established by the market generally. The discrepancy between the statements of Judson and Gest, if they may be consid-

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ered binding as testimony upon the master, is very great, as to the value of this property—one of them making it only \$48,260 and the other \$100,000. The master says that in view of all the circumstances, he finds that a reasonable price would be \$100,000, and thinks it would be rather less than the actual value. Now the question is whether the court can interfere with the report of the master on the ground that he has committed an error as to the value of this rolling stock. It was competent for the master to believe one of these witnesses rather than the other, and unless there are some circumstances in the case that show the one fixing the lesser value was more entitled to credit than the other, the court cannot interfere with the report of the master on that ground. It is the duty of the party making the exception to satisfy the court that the report is wrong in this particular; otherwise it must stand.

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There is one point upon which the court differs from the master, and the exception will be sustained; and that is, as to the rule by which the master determined the amount of rent to be paid to the parties who owned the rolling stock which ran over this road, and by means of which the income was obtained. The interlocutory order of May, 1869, instructed the master that a reasonable rent should be allowed for the use of this rolling stock, and the master has fixed the rent at eight per cent., and finds that sum was a reasonable rent for the use of the rolling stock employed in making the earnings over twenty-seven miles of the road.

The question is whether, all things considered, that is a sound rule. I hardly think it is. It is right that the master should be heard in explanation of his finding upon this point, and he says that the rolling stock employed was maintained and kept in repair by expending money and labor, treated and charged as part of the operating expenses of the road, and therefore in fixing the amount of rent he did not take into consideration the wear and tear, but the value of the rolling stock as forming so much capital invested and em-

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ployed in making the earnings, and he has apportioned the value according to the length of the road; and, upon the capital thus ascertained he has calculated it at eight per cent. as a reasonable rent. Now I think the circumstances of the case do not warrant that. It seems to me that that is too low a per cent. for the use of the rolling stock of the defendants. This was an important element in the earnings of the road, and it seems to me that the master has hardly had a just appreciation of the part this rolling stock bore in obtaining these earnings. Eight per cent. on that kind of property, considering how subject it is to loss and deterioration in many ways, seems hardly enough, and I think that the facts scarcely warranted the master in finding so low a per centage; and that exception will be sustained by the court.

Some criticism has been made upon the manner in which the master obtained the results upon his *pro rata* rule. It is insisted on the part of the defense that he has made his denominators too low in every instance. For example, the master took the length of the road from Richmond to Logansport, one hundred and eight miles, to obtain a *pro rata* estimate for twenty-seven miles, then he took the length of the road from Richmond to Valparaiso, 170 miles, to make a *pro rata* estimate, and then for Chicago 216 miles, and then for the whole length of the road, about 580 miles. I am rather inclined to think there is something in this criticism on the part of the defense; and therefore in referring back the case to the master, I shall ask him to reconsider his *pro rata* estimate upon these points and see whether he has been precisely correct. I am not certain as to this, and therefore I shall not make an absolute ruling upon that point.

There is only one remaining question which, although it is not absolutely necessary now to discuss or decide, still as it was presented in the argument, and may have some influence upon the action of the parties, I may as well state what is the opinion of the court. That is as to the effect of any finding of the court against the defendant for the indebtedness which

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is due for the income upon its property, I mean the Cincinnati and Chicago Air-Line Railroad Company. It is claimed that although the mortgage may not cover any other property than that between Richmond and Newcastle, as it included the income and after-acquired property of the road, and the defendant was in possession, subject to the equities protected by the mortgage, that its property is bound equitably for any decree that may be rendered against it. And I do not know why this principle, to some extent at least, may not be a sound one. They, as the operators of the road from Richmond to Logansport, received the income on this particular part; as receivers of the income of this part they may be bound to respond for that to the mortgagees under the mortgage of 1852.

As the court has already said, they held it in trust for whomsoever are entitled to it, and having so received and held it, there may be, perhaps, an equitable lien upon their property to respond for the amount. But I do not decide this point, and it may remain open for future consideration.

I may say, in conclusion, that the master appears to have devoted himself with great industry and fidelity to the investigation of the several points submitted to him by the court, and the manner in which he has discharged his duty, considering the many difficulties and embarrassments attending its performance, is very creditable to him. And the court, in the examination of the various questions referred to in this opinion, has derived great assistance from the arguments of the counsel on both sides.

For other opinions in this case, see *Bill vs. The New Albany &c., Railway Co.*, Vol. 2 of this Series, 390; *James Pullan vs. the Cincinnati & Chicago Air-Line R. R. Co. et al.*, 4 do., 85.

That a court may on, or previous to, the final judgment revise any of its preliminary orders, consult *Breedlove vs. Nicolet*, 7 Peters, 413; *Simson vs. Hart*, 14 Johnson, 63; *Akerly vs. Vilas*, Vol. 2 of this Series, 110.—[Reporter.

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CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY, 1873.

IN BANKRUPTCY.

ASSIGNEE—REMOVAL.

1. DISCLOSURE TO CREDITORS.—It is the duty of an assignee to disclose to the creditors, upon inquiry, and where it appears they are ignorant thereof, the main facts known to him relating to the condition and assets of the bankrupt estate.

2. DEBTORS PURCHASING CLAIMS TO SET-OFF.—Where he knows there is a large sum of money on deposit in a bank, belonging to the estate, against which the bank claimed and were purchasing set-offs, it is his imperative duty to state these facts to creditors inquiring concerning the value of their claims.

3. EXCUSES—WHAT INSUFFICIENT.—It is not a sufficient excuse that he could not give definite estimates as to what the estate would pay, or that he says he did not intend to mislead any one. He is presumed to intend the necessary consequences of his own acts, and the concealment of the existence of this large deposit must mislead creditors and affect their action. Nor is it a sufficient answer or excuse that the books of the bankrupt could be examined by the creditors.

4. REPORTS.—The assignee should also make, in season, the reports prescribed by the rules in bankruptcy.

5. REMOVAL—WHEN ORDERED.—Where an assignee has failed in properly informing creditors in regard to their rights and the value of the assets, and the information has been suppressed in the interest of one class of creditors, it is the duty of the court to remove him.

6. PRACTICE.—On a revisory petition to the circuit court, the proper practice is to direct the district court to remove the assignee and to appoint some other competent person in his place.

This was a petition by John A. King and Newton S. Taylor, creditors of the State Insurance Company, bankrupt, filed under the second section of the bankrupt act, to review an

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order of the district court refusing to remove Norman C. Perkins, assignee of the State Insurance Company of Chicago, bankrupt.

This corporation, organized under the general law of the state of Illinois, and doing business in the city of Chicago up to the 9th day of October, 1871, sustained such losses on that day that it became insolvent and suspended business.

On the 2d of November the attorney-general of the state commenced proceedings in the circuit court of Cook county to wind up the corporation under the statute of the state, in which proceedings Horace A. Hurlburt, the president of the company, was appointed receiver, George C. Smith, president of the bank and treasurer of the insurance company, and his brother, Charles M. Smith, vice-president of the bank and vice-president of the insurance company, signing his bond.

On the 8th of December following, a petition in bankruptcy was filed against the company in the district court of the United States for this district, under which the company was, on the 12th of January, 1872, adjudicated a bankrupt by default. No schedule or inventory was filed until the 17th of February, 1873.

At the time of the fire, October 9, 1871, the company had in the hands of George C. Smith, its treasurer, on deposit in the National Loan and Trust Company, a bank of which he was president, the sum of sixty thousand dollars in cash, good mortgages to the amount of about one hundred thousand dollars and also United States Government bonds of the value of two hundred thousand dollars. These bonds were, at that time, in New York city but soon afterwards were, by Smith's order, converted into cash and the proceeds deposited in this bank.

The losses of the company by the fire were between \$600,000 and \$700,000. The books of the company were in the hands of the treasurer, and were not exhibited to any outside persons, and the reports ordinarily given of the liabilities and assets of the company by its officers and those winding

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up its affairs, were that the losses were about ten times its assets. Immediately after the fire the bank commenced buying up the proofs of loss as filed against the company, at the rate of ten per cent. on their face, for the purpose of offsetting them against the funds on hand. By the 1st of December they had purchased claims to the amount of two hundred and sixty thousand dollars, upon which they issued certificates of indebtedness in the name of the company, to J. Bradner Smith, a brother of George C. Smith and Charles M. Smith, which certificates were taken to the National Loan and Trust Company Bank and charged up at their face against the deposit of the company. The policies and proofs of loss upon which these certificates were issued were left in the office of the company as taken up, and canceled. The balance still in the bank to the credit of the company was further diminished by deductions for salaries paid, and retaining fees of counsel, and loans to the amount of about twenty thousand dollars, and a further charge was made of forty-two thousand dollars for stock of the insurance company which the bank had bought before the fire.

In the schedules all the policy-holders were returned as creditors of the company, but not J. Bradner Smith, to whom the certificates of indebtedness had been issued, nor the National Loan and Trust Company which had purchased them. The cash on hand was stated at \$17,779.33, being the amount of the deposit in the bank after deducting all charges made against it. The other assets were returned as bills, notes and other securities to the amount of about one hundred and twenty-five thousand dollars.

At the election on the 12th of April, Norman C. Perkins, who had previously been the attorney for both the bank and insurance company, was elected assignee by an almost unanimous vote, Shufeldt & Ball, the brokers through whom the bank had purchased the claims against the company, casting all their votes for him; and on the 15th of the same month he was confirmed by the district court, and gave bond in

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the sum of one hundred thousand dollars, with Charles M. Smith and J. Bradner Smith as sureties. No attempt was ever made by Perkins to recover from the bank the money or securities in its hands, except the balance of \$17,779.33 ; nor to dispute the charges made by the bank against its deposits ; nor was any report or statement ever made by him that the bank was indebted to the company, or that the company ever had assets in the hands of the bank above that amount, or any claim against the bank in any way.

On the 12th of July of the same year, a petition for the removal of Mr. Perkins as assignee was filed in the bankruptcy proceedings by Newton S. Taylor, a creditor of the bankrupt, and subsequently various other petitions, additional and supplemental, were filed for the same purpose. The principal causes of complaint against the assignee in these petitions were the receiving of four hundred dollars for services rendered the bankrupt as counsel, which was claimed to be a preference under the bankrupt law, and also the settlement, at too small an amount, of a claim on re-insurance against the Teutonia Insurance Company of Cleveland, Ohio ; and, principally, that in his conduct as assignee he had suppressed from the creditors of the bankrupt, material facts in relation to the affairs of the company and its assets, particularly the transactions of the bank and its officers, and the large deposit and securities in their hands, which, it was claimed, he should, in good faith, have communicated to them.

Upon these petitions, the answers of the assignee and proof taken before the register, the district court refused to grant the prayer of the petitioners and to remove the assignee. Thereupon this petition for review was filed in the circuit court, under the second section of the bankrupt law.

Cooper, Garnet & Packard, for petitioner, cited as to what was sufficient grounds for removing assignee: *Ex parte Stagg*, *In re Burton*, 2 Montagu Deacon & DeGex, 186; *Ex parte Molineux*, *In re Keat*, 1 Deacon, 603; *Ex parte Ashmore*,

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In re Lucas, 3 Montegu Deacon & DeGex, 461; *Ex parte Contre*, *In re Robinson*, 3 DeGex & Jones, 116; *Ex parte Perryer et al.*, *In re Innes & Bracher*, 1 Montagu, Deacon & DeGex, 276; *Ex parte Leman*, 13 Vesey, Jr., 271; *Ex parte Copeland*, *In re Weston*, 3 Deacon & Chitty, 561; *Ex parte Shaw*, *In re Howard & Gibbs*, 1 Glyn & Jameson, 127, 156; *In re Morse*, 7 Bankruptcy Register, 56.

Sidney Smith, for assignee.

DRUMMOND, J. I shall discuss but one of the points made in the petition, viz.: that when application was from time to time made to the assignee by creditors of the company, the very object of which it must have been apparent was to ascertain the condition of the company, he suppressed facts which were within his knowledge, and which it was his duty to communicate. I will proceed to state very briefly the reason why I think this information was suppressed, and why it was his duty to communicate it.

We have to assume that the creditors thus inquiring of the assignee as to the condition of the assets of this company, were claimants against those assets, and were inquiring as to their own property. Now, I am aware that it is no uncommon thing for an assignee to be annoyed by numerous applications and inquiries about the affairs of a bankrupt, and I make all due allowance for the natural impatience which might thus be created. If that were all of which complaint could be made against this assignee, the court would not interfere with the ruling of the district court; but this was not all. The books of the company came into his possession, according to his own statement, about the 2d or 3d of May, 1872. These books show certain facts, and the court will presume that the assignee, at the time or shortly after these books came into his possession, knew them, some of which were these: That the principal managers of the State Insurance Company and of the National Loan and Trust Company were

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the same; that George C. Smith was the treasurer of the company and president of the bank, and that, at the time of the insolvency of the company, there was on deposit with the National Loan and Trust Company to the credit of the company over three hundred thousand dollars; that between the date of the insolvency of the company and the time when the books came into the possession of the assignee, and he became acquainted with their contents, the parties who had the management, to a greater or less extent, both of the insurance company and the bank, had been concerned in purchasing claims against the insurance company with a view to set-off those claims against this deposit account, and I may add, he knew these purchases were made under circumstances which showed that the parties purchasing were endeavoring to depreciate the value of the claims against the company with a view of obtaining them for less than their value.

These are facts which were known to the assignee, or ought to have been known to him, immediately after the books came into his possession. One leading fact to which I have adverted was this: That there was on deposit to the credit of the company the sum of over three hundred thousand dollars. Another fact that he knew was that Mr. Hurlburt, as the receiver under the appointment of the state court, did not set up any claim to this large deposit.

Whatever view may be entertained of the right of a debtor of a bankrupt corporation to go into the market and purchase claims against that corporation for the purpose of setting them off against his own debt, having knowledge, at the time that he makes the purchase, of the bankruptcy of the corporation, about which members of the profession and judges may differ, (though this court, on the 5th of June last, decided that, under such a state of facts, the set-off could not be allowed¹) there can be no doubt, in my opinion, that, under

¹ See *Drake vs. Rollo, assignee, &c.*, vol. 3, of this series, page 273; *Hitchcock vs. Same*, Id., 276; *Sawyer vs. Hoag, assignee, &c.*, Id., 293.

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the circumstances connected with the deposit in the National Loan and Trust Company and the purchase of the claims against the insurance company with a view to set them off against the deposit account, a court of equity would never allow such a set-off, obtained by parties occupying a fiduciary relation to the company, and so connected with the bank, and possessing knowledge that no other parties possessed.

Now, this assignee, whatever might be his opinion as to the set-off, must be presumed to know the facts under which the set-off was sought to be made. Possessing this knowledge, let us see what he did, and what he omitted to do, when application was made to him by various parties who had a right to know some of these facts. For instance, Mr. Millard testifies that about July 1st, 1872, ten days before the first petition was filed, he called on Mr. Perkins in relation to the purchase of claims which he represented; Mr. Perkins referred him to Mr. Truman, who was in the same office. The witness asked if Truman was buying up the policies; Truman said he was, and was paying thirteen cents for them. Afterwards he called upon Mr. Truman, and he said he was paying seventeen cents.

Now there was a person who called upon the assignee, the very object of whose call, it must have been known, was to ascertain something about the value of the policies, and of the claim which he had against the company.

Mr. Thomas testifies that an application was made by him to the same effect as that made by Mr. Millard. The assignee told him he could not purchase the claim himself, but he knew a party who was purchasing. The assignee asked how much had been offered for the claim, and he told him twelve and a half per cent. The assignee gave the impression, "It was worth, he thought, something more than that, but don't think he mentioned any figures."

T. W. Brophy testifies that about the 18th of May, he had an interview with Mr. Perkins in reference to a claim. The assignee said he did not know what the company could pay;

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that many policies could be bought for ten cents on a dollar; he had sold his for that, but did not know whether more could be realized or not. The assets of the company consisted of some mortgages—"don't know whether he said it had any bonds or not; don't remember as he said anything about that; think that was all." The mortgages were on buildings that had been destroyed.

Newton S. Taylor testifies that he called on the assignee the last of May, or the 1st of June, to ascertain what the prospects were for receiving anything from the company; that he asked the assignee what the assets of the company were; that the assignee replied that there was a bond of thirty thousand dollars which he thought was good, and a few mortgages—one of five thousand dollars on the North side which he thought wasn't good; that the assignee represented nothing else. He asked the assignee when any dividends would be declared, and he replied that if there were any it would be very late in the fall—probably not until spring.

George Gardner testifies that he called on the assignee some time in July stating that he called to obtain information about the affairs of the company. The assignee in substance replied that the company "was in a pretty bad box, didn't amount to much, and wouldn't pay a great deal;" the witness did not inquire about the specific assets of the company, nor did the assignee state; nothing was said by either party about any funds on deposit in the National Loan and Trust Company Bank.

These are statements made by various parties purporting to have, and who, it is not disputed, did have claims against this bankrupt insurance company, who called upon the assignee at the various times mentioned, for the purpose of obtaining information of its affairs.

Now, it is most extraordinary that with the knowledge of the assignee of the fact—that there was or had been on deposit over three hundred thousand dollars to the credit of the company—it was not communicated to any one of

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these parties making inquiries. It certainly was a fact calculated greatly to affect their interests and their subsequent conduct in relation to their various claims. It was a fact that had a very important bearing upon the value of the claims, as they then existed, in the market.

If we concede that the assignee knew of the claim of set-off and believed that claim was well founded, still it is singular that in not one of these instances did he communicate so important a fact. It was for these various creditors to judge of the legal effect of that fact and to determine what their conduct would be.

If it was not necessary for the assignee to go into any general details about the character of the claims, still I must insist that it is not possible to explain his silence in relation to this large deposit consistently with what I conceive to be entire fair dealing to the creditors who were inquiring about what belonged to them. The assignee had no further interest in them than what he might receive as compensation for administering them. The true course was to state this fact, and say that the value of the assets might very much depend upon the validity of the claim of the bank against the deposit account as a set-off, and leave the parties to judge for themselves.

It is clear that many of the parties did not know of the existence of this fact, and it is also clear that several of these interviews took place after the decision of the court in relation to the general law of set-off, on the 5th of June, 1872.

It cannot be said that the assignee did not disclose this fact because it was notorious. It certainly was not known to most of these applicants, even if to any of them. I think the duty was the more imperative upon the assignee to make this disclosure, because of the proceedings in the state court, under the state law to wind up the company, the appointment of the receiver, and report that he had only a little more than seventeen thousand dollars in his hands.

But the assignee has a right to be heard as to his own con-

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duct. Let us examine and see what his account is when being examined as to whether he communicated this principal fact to any of these creditors.

This question is put to him:

Q. Did you report the fact of these moneys in the National Loan and Trust Company Bank to any of the creditors before the 12th of July, and, if so, to whom—any creditors of the insurance company?

That is a plain, distinct question as to a matter within his personal knowledge, and which admitted of a distinct answer—and this is the answer:

A. I don't know that I had any occasion to make any report to any of the creditors concerning the particulars. I answered questions as they asked them of me.

He is asked as to a fact, and he says that he does not know that he had any occasion to make any report, and that he answered questions as they were asked.

Then this question was put:

Q. Did you make a report to any of the creditors before the 12th of July, and before King & Taylor's petition was filed?

A. I made no report to any creditor concerned; I made no report until the second creditors' meeting; I answered questions and gave such information as I was able to from time to time.

Then this question is put to him:

Q. Did you ever give any information to any creditor, before the 12th of July, of the moneys on deposit in the National Loan and Trust Company Bank; if so, to whom?

A very clear question, admitting of a distinct answer—and what is the answer?

A. I never made reports to any. I answered questions asked me, and gave information required of me.

The next question is this:

Q. Was that question ever asked you—that is, as to the

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deposit in the National Loan and Trust Company Bank?

The answer is: "I don't think it ever was."

Q. And you never volunteered the information to any creditors?

A. I don't know I had any occasion to say anything to any creditor you represent.

Now I think this testimony is not fair, candid, nor creditable to the assignee. I have already said, and I now repeat, that it was the imperative duty of the assignee to disclose this fact to the parties who made the application; that good faith required him to do it, and that he was not acting fairly to the creditors when he refused or declined to make the disclosure, and it is impossible to avoid asking the question whether, if this had been a deposit account in a bank managed by persons or parties who had not elected him assignee, and with whom his associations, personal and professional, had not been more or less intimate, he would have refused to make the disclosure.

Let us examine a little further the testimony of Mr. Perkins, in order to form an opinion as to his own view of his conduct. He says: "At the outset I considered that if I should give people estimates and conjectures as to what must be uncertain—the amount finally paid—I should certainly mislead some, and subject myself to blame, and I accordingly resolved to make no such estimates to any person; and I never have. Mr. Gardner mentions in his testimony that he had been previously told, by other persons, that the company would not pay more than ten or twelve cents, and he may have mentioned those figures in our interview; likely enough he did, and if he did, I probably didn't contradict him."

Now, no one pretends that it was the duty of the assignee to state how much the assets of the company would pay, for that depended upon circumstances not within his knowledge. That is not the question. It is not that he did not state how much the assets of the company would pay, but that he did not state a fact which would constitute an all-important ele-

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ment in the calculation as to how much the company might pay, and thus leave creditors to determine for themselves, having knowledge of that fact, how much it would probably pay. When he says, Mr. Gardner "may have mentioned those figures in our interview * * * and if he did, I probably didn't contradict him," is he not condemning himself by thus admitting that he did not disclose this fact to those who had an absolute right to be informed of it?

But let us hear him further:

"Q. Was there any reason to contradict him?"

"A. I should have no reason to. I abstained conscientiously and invariably from making figures, or giving figures to anybody, in reference to the matter, and have until the present time."

"Q. Now, sir, have you either to Mr. Gardner, or anybody else, said anything or done anything to mislead them in relation to the value of their claims?"

"A. I certainly have not intended to. It is impossible for me to tell what effect the interviews with me have had. I have not had the intention to mislead anyone."

A man must intend—such is the rule of morals, of law, and of common sense—the necessary consequences of his own acts, and when the assignee says that he did not intend to mislead anyone, he, as a man of intelligence, must know that no one can avoid the conclusion that his conduct was of such a character as necessarily to produce that result—that such was the legitimate effect of his conduct, not, perhaps, by a deliberate mis-statement, but by the suppression of a fact within his knowledge, and which it was his duty to communicate to the parties.

The assignee afterwards gives a further explanation when this question was put to him.

"Q. Now, then, Mr. Perkins, I want you to explain, if you have any explanation to give, why it was you didn't explain to them something about this large amount of money on deposit in the National Loan and Trust Company Bank?"

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A very natural question, and one which would seem, to an indifferent person, to require some sort of an explanation. The answer is:

"A. I didn't undertake to take every creditor who came in, and explain to him at length everything I had in my hands, from which I expected to realize anything; if I had, I would be able to do nothing else, for a great many people came there. My time was fully occupied in attending to the affairs of the company, which needed immediate and constant attention, and I didn't undertake to, nor did I regard it as my duty, to go over with every man who came in there and asked me a question, a long statement of what I had got on hand and expected to receive, or to go into conjectures of what the company would probably pay. I didn't regard that as my business. I answered very cheerfully and fully all questions asked of me, and gave every information I knew anybody wanted so far as I could."

Now is that exactly true? Certainly the fact that there were over three hundred thousand dollars on deposit in the National Loan and Trust Company Bank, was information that the creditors of the bankrupt insurance company would have been very glad to obtain. That information was certainly wanted. That information was not communicated.

It may be said that the books were at the disposition of, and could be examined by, the creditors. That may be true. I suppose that any of the creditors could have examined these books, either upon application to the assignee or to the court. But the fact that the creditors had the power to examine books, constitutes no reason why the assignee, under the circumstances which have been mentioned, should suppress a fact so material, and which was within his knowledge, and which he must have known was not within the knowledge of the applicants.

I make no comment upon a great deal in the testimony of the assignee, which exhibits a flippancy entirely out of char-

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acter with the investigation and subject of inquiry, and which, to say the least, is a violation of good taste.

There are many objections to the removal of this assignee, and it is with some hesitation that I have come to the conclusion that he must be removed. He has become familiar with the business of the bankrupt company; he is a man of intelligence, and is, probably, in many respects, considering the knowledge he possesses of its affairs, especially well qualified to go on and finish up the administration of its assets; but I have felt it impossible to pass over his conduct, under the circumstances which have been mentioned, and where, as I think, he suppressed information that he ought to have communicated.

I feel that he was not acting under that rule which is the only safe rule for men in their transactions with each other; that he was not doing to these creditors as he would have required any one of them to do to him, under similar circumstances. Therefore, I cannot excuse or pass by such an omission as I find actually existed in this case.

It is not disputed that the assignee did not comply with the rule of the Supreme Court of the United States, made at the December term, 1871, relative to the reports of assignees. The assignee himself admits this, and one of the reasons given for non-compliance is that he was not aware of the existence of the rule. But he also admits that in July he knew such a rule had been made, and yet there was no report made by him, either to the register or to the court, until about the 1st of September, 1872.

I only refer to this, without laying any great stress upon it, although he might and ought to have made a report earlier than he did. It is not on that ground that the court acts.

I am aware of the objections to the appointment of another assignee, but other considerations influence me, independent of what I have already stated. It is clear, although the assignee does not admit, but disavows it, that there is such a feeling in his own mind for some of the creditors of

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this company, and against others, that his conduct is influenced, and has been, and may be again, by these feelings.

It is also clear that a large and respectable portion of the creditors of this company entertain such feelings toward the assignee, that they have no confidence in his administration of the assets of the company, and without saying that they are justified in all the sentiments of hostility which they entertain toward him, it is apparent, from what the court has already said, that in its opinion their hostility is, to some extent at least, justified by the facts.

Taking all these circumstances together, in my opinion, the best interests of all parties who have any claims against this company will be promoted by having some one else act in place of the present assignee.

It has been somewhat a question with the court, whether it is the duty of the circuit court to appoint the assignee, but the conclusion arrived at is that the court must remit the matter to the district court, requiring that court to remove the assignee, and to appoint another in his place.

The order of the court will therefore be that the district court be required to remove the assignee, and to appoint another competent person in his place.

JOSEPH R. PAYSON, ASSIGNEE OF REPUBLIC FIRE INSURANCE COMPANY, vs. WARREN H. WITHERS.

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY TERM, 1873.

1. **LIABILITY OF STOCKHOLDERS.**—In an action against a stockholder, brought by the assignee of a bankrupt insurance company, to recover an assessment on stock, it is not a sufficient defense to show ignorance on the part of the defendant as to the condition and circumstances of the company when his subscription was taken.

2. **STATEMENTS MADE BY AGENTS** of the company do not affect the liability of the defendant, as loose declarations made at the time cannot change a written contract.

3. **SOLICITING SUBSCRIPTIONS NOT ILLEGAL.**—The soliciting of subscriptions to the capital stock of a foreign corporation is not an act or agreement intended to be rendered inoperative by the act of June 17, 1852, of the state of Indiana.

4. **INCREASE OF STOCK—EFFECT ON SUBSCRIPTION.**—Where it is provided in the charter of a corporation that “the capital stock shall be \$1,000,000, and may be increased to not exceeding \$5,000,000, at the discretion of the stockholders,” and where an amendment is made which declares “that the board of directors shall have power to increase the capital stock of said company, from time to time, in their discretion,” a subsequent increase of the capital stock will not invalidate a subscription to the capital stock made previous to the passage of the amendment, and it makes no difference that the increase was made by the board of directors instead of the stockholders.

5. **EVERY STOCKHOLDER** takes his shares subject to the lawful control of the legislature and of the board of directors.

6. **LEX LOCI.**—Where a citizen of one state makes a contract to be executed in another he is bound by the laws of the state where the contract is to be performed.

7. **ESTOPPEL.**—A stockholder who retains his stock, and continues to participate in the profits of the corporation without denial of his membership, cannot successfully repudiate his contract, holding that he is not obliged to pay an assessment upon the ground of certain irregularities in the increase of the capital stock of the corporation.

Payson vs. Withers.

This was an action by Joseph R. Payson, assignee of the Republic Fire Insurance Company of Chicago, Illinois, against Warren H. Withers, to recover an assessment of \$60 made on each of the ten shares of capital stock of the said insurance company held by him.

The facts are stated in the opinion.

Baker, Hord & Hendricks, and *Charles E. Marsh*, for plaintiff.

Morris & Withers, McDonald & Butler, Harrison & Hines, and *W. H. Calkins*, for defendant.

DRUMMOND, J.—The cause of action, as set forth in the complaint, is, that on the 30th of July, 1868, the defendant became owner of ten shares of capital stock of the insurance company, and that the stock was issued and taken by the defendant upon the condition that twenty per cent. was to be paid in cash, and eighty per cent. was to be paid in case losses rendered its payment necessary; that these were the terms of the charter, and the conditions upon which the defendant became a subscriber to ten shares of the stock; and a certificate of stock for these shares was accordingly issued to him. The complaint proceeds to state that by the losses which occurred on the 9th of October, 1871, at Chicago, the company became insolvent; that a petition in bankruptcy was filed against the company in the District Court of the United States for the Northern District of Illinois, and a decree of bankruptcy was rendered against it in that court; and that court had made an assessment of sixty dollars on each share of the stock, and required the assignee to collect the same.

There is a general denial by the defendant, which puts the material allegations of the complaint in issue; and there are various special defenses set up in the answer, the effect of which is the matter for consideration. The first special defense is, in substance, that the subscription of stock was made by the defendant in Fort Wayne, in this State; that the company was domiciled and established in Illinois, and was, in

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fact, a corporation created by the laws of Illinois; that the agents of the company came to the defendant and made certain representations as to its condition, and the terms upon which the stock was to be subscribed, alleging that no more than twenty dollars per share would be assessed against him or ever called for. The defendant asserts that he was ignorant of the actual condition of the company, and of the circumstances connected with its organization and progress so far, and that he, relying upon the statements of agents, authorized his name to be entered as a subscriber upon the books of the company, and upon that condition.

Now, as to this defense, it will be observed that it does not meet the material allegations of the complaint, or answer them. It may be all true, still the agreement set forth in the complaint would create an absolute liability on the part of the defendant, as, by the terms of the charter, the stock was to be taken in the manner stated, paid for as set forth, and he agreed to these terms in writing.

This defense clearly, therefore, does not go far enough. The result would be, even giving it all the effect that could be claimed for it, to change, by loose declarations made by the parties at the time, a written agreement, which of course cannot be done according to the well-settled principles of law.

Another special defense is, that the subscription to the stock was made by the defendant in Indiana; that the agent of the company, who was then engaged in the general business of procuring subscriptions to the stock of the company in this state, did not comply with the laws of the state of Indiana prior to the commencement of its business; and, therefore, that the subscription was not operative as against the defendant. This is a special defense set up under the act of June 17, 1852, of this state, respecting foreign corporations and their agents; and the first section of that act declares as to corporations not incorporated or organized in this state, that the agents, before entering upon the duties of their agency in this state, shall deposit in the clerk's office of the

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county where they purpose doing business, a power of attorney, commission, appointment, or other authority, under or by virtue of which they act as agents. The second section declares what the agents of the corporation shall do, viz.: file with the clerk of the circuit court before commencing the duties of their agency, the authority of the board of directors authorizing citizens of this state to maintain actions in the state in relation to any contracts, and authorizing service of process. The third section declares that the service of process on agents shall be sufficient. And the fourth section, that foreign corporations shall not enforce any contracts made by their agents before a compliance shall have been made with the provisions of sections one and two of the act. The fifth section declares that any person who shall directly or indirectly receive or transmit money or other valuable things to or for the use of such corporation, or who shall in any manner make or cause to be made any contract, or transact any business for or on account of any such foreign corporation, shall be deemed an agent of said corporation, and be subject to the provisions of this act relating to the agents of foreign corporations. These are the provisions of the law contained in the first, second, third, fourth and fifth sections. The sixth section, however, provides that the fifth section shall not apply to persons acting as agents for foreign corporations for a special or temporary purpose, and for a purpose not within the ordinary business of such corporations.

Now it is a question which lies at the threshold of the examination of this part of the case, whether the act which was done by the agent of this corporation and the agreement which was entered into by the defendant with that agent, was such an act or agreement as was contemplated by this law, and which it intended to render inoperative unless the agent had complied with its conditions. I am clearly of the opinion that it was not. Conceding that a state would have the power to prevent any of its citizens from subscribing within its own limits to the stock of a corporation of another state, it would

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require a clear and explicit declaration that such a subscription should be null and void except upon compliance with certain terms. This act relates to the usual business done by a corporation and by its agents, and does not refer to obtaining subscription to its stock. The ordinary business, for instance, done by the corporation in question here, was an insurance business. The obtaining of subscriptions was an act preliminary to the commencement of its business. When the subscriptions were obtained, and the corporation was set in motion and was made to perform its functions, then the ordinary business referred to by this act began—the issuing of policies of insurance and performing the general and other business connected with such corporations.

I do not think that it is a fair or reasonable construction of the language of this law that it intended to prohibit such a contract as this. It does not appear, in point of fact, by this special defense which I am now considering, that the corporation was doing any of this ordinary business. The language, I think, therefore, of this sixth section, intended to exclude any such agreement as was made by the defendant in this case, when it declared that it was not to apply to persons acting as agents for a special and temporary purposes, or for purposes not within the ordinary business of such corporation.

Another special defense set up is, that the company, without the knowledge or consent of the defendant, on the 25th of March, 1869, obtained from the legislature of Illinois an amendment to its charter by which the directors had the right to increase the capital stock of the company to five millions of dollars, and thereby the original charter was so changed as to release him from his liability to pay for his stock. It is necessary, in order to determine the validity of this defense, to look into the charter and the amendment to see whether it is justly subject to the objection that is made by the defendant. The act incorporating the Republic Insurance Company was passed by the legislature of Illinois on the 15th of February, 1865. The first section of the act created certain

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persons and their successors and assignees a body corporate by the name of the Republic Insurance Company of Chicago. The second section was as follows: "The capital stock of said corporation shall be one million of dollars, and may be increased to not exceeding five millions of dollars, at the discretion of the stockholders, and shall be divided into shares of one hundred dollars each, which shall be considered personal property, and be assignable and transferable only upon the books of the company under such regulations as the directors shall establish." The third section provides that when one hundred thousand dollars were subscribed and certain conditions were complied with,—that they had organized by choosing three or more directors, and those directors had chosen a president, secretary and treasurer, and filed a certificate in the office of the clerk of the city of Chicago,—then the company was deemed fully organized. The fourth section authorized the corporation to make and put in execution by-laws and regulations. There are some other sections of the character usual in the charters of corporations of this kind, to which it is not necessary to refer. The eighth section declared that the stock and affairs of said corporation should be managed by three or more directors. Now this is, as far as it concerns any question involved in this special defense, all of the charter that need be referred to.

The amendment which is objected to and referred to in this special defense, was passed by the legislature of Illinois on the 25th of March, 1869, the first section of which authorized the company to purchase and hold such real estate as might be convenient for the transaction of its business, and also to purchase any estate that it might be necessary to purchase for the purpose of securing any loan or debt. The second section of the amendment was as follows: "The board of directors shall have power to increase the capital stock of said company from time to time, in their discretion." It will be recollected that the language of the second section of the original act was, that it might be increased to not exceed-

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ing five millions of dollars, at the discretion of the stockholders. This authorized it to be increased at the discretion of the board of directors. The amendment says nothing about the extent of the increase. The third section declared that the stockholders resident in any town or city within the United States might, at any annual meeting of such stockholders to be held in such town or city, elect such number of members for a board of directors as such stockholders might be entitled to by the by-laws of the corporation. The fourth section authorized the board of directors to make by-laws. The original act was, that the corporation might have power to make and put in execution by-laws—probably no essential difference between the original act and the amendment in this particular. The amendment contains two other sections that have no bearing upon the question before the court.

Now so far as there are any changes made by the amendment of such a character as to affect the contract which the defendant had made in 1868 with the corporation, there are only two particulars to which it is necessary to refer. As I have said, by the original charter the capital of the company was to be increased to five millions of dollars at the discretion of the stockholders; by the amendment, the board of directors had the right to increase it. The original charter declared that certain notice should be given of the election of directors to each stockholder by public advertisement or personal notice, and that it should be by ballot, by a majority of the stockholders, allowing one vote for every share either in person or by proxy; and the amendment declared that certain persons, under the circumstances referred to in it, should meet and elect directors—as many as the by-laws would authorize. These seem to be the only substantial particulars under which it can be claimed that the amendment constituted such a change in the relation between the corporation and stockholders as to authorize any stockholder to claim that the contract which he had made to subscribe to the stock was vitiated; and

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the question is, whether these changes give any countenance to that position. I think they do not.

How the discretion of the stockholders to increase the stock should be made manifest, the original charter does not state. It declared that the stock and affairs of the corporation were to be managed by the directors, and there is great force, I think, in the argument, that inasmuch as the directors were the persons through whom the stockholders acted, that discretion might be manifested through the authorized action of the directors. But, however this may be, I do not think that the change of such vague and indefinite phraseology as this, as to the manner in which the capital of a corporation is to be increased, would give the right to a subscriber to the stock to declare that the contract which he had made for his subscription and under which he paid a certain portion, and agreed to pay the remainder when the necessity for its payment appeared, was at an end. It seems to me that it was one of the implied conditions upon which he entered into his agreement—that the power of the legislature might be exercised to vary in that way the manner in which the capital stock should be increased. It may be conceded that there are limitations to the power of the legislature in such a case as this; that the legislature may go so far in changing, altering, or revolutionizing the whole scope and spirit of the original charter by amendments, as to authorize a stockholder to say that he has not entered into that contract—that his obligations have ceased by the wrongful acts of the legislature; but while that is true, it is also true that, to a certain extent, the terms of a grant are subject to the control of the legislature, and every stockholder takes his shares subject to that control, and subject also to the control of those who manage its affairs, namely, the board of directors. And, therefore, when the legislature has acted in such a manner as this, and has merely declared that, instead of the stock being increased by the corporation at the discretion of the stockholder, it shall be increased by the resolution or act of the board of direct-

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ors, it is not such a change, in my opinion, as would authorize a subscriber to say that his contract is at an end.

Then, as to the election of directors. It is true that there is, to some extent, a change made in the mode of electing directors; but it is to be observed that the original charter does not declare how many directors there shall be. It is three or more—no limit to the number of directors; and the amendment simply declares that the stockholders, within certain territorial limits, may have the power to elect such a number of directors as the by-laws may authorize. Now, certainly there is nothing in the original charter to prevent these by-laws from declaring what number of directors there shall be, and what their qualifications, other than they must be stockholders as the original charter requires. There was, therefore, no such change by this amendment, in the original terms of the law, as to authorize a subscriber to the stock to declare his agreement or subscription at an end and his release from its obligation.

The other special defense, and I think the most important one presented in this case, is that which declares that this was a company incorporated by the legislature of Illinois with a capital stock of one million of dollars, and power to the stockholders at discretion to increase it to five millions of dollars; that the stockholders never increased the stock, but that the board of directors, in January, 1868, by resolution pretended to do so to the extent of five millions of dollars; and that the stockholders never consented to this increase; that the defendant subscribed for his stock in July, 1868, at Fort Wayne; that this stock was in excess of the one million of dollars of stock which was authorized by the original charter; and that he had no knowledge of the manner in which the capital stock had been increased. It will be seen, however, from what has already been said, that it can hardly be claimed, on the part of the defendant, that this change was of such a character, taking this special defense in its largest extent, as to authorize him to declare his obligation at an end.

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And I have said, it may well be claimed that it was a power incident to the grant, for the legislature to authorize an increase of the capital stock by the directors, even if, under the terms of the original charter, the stockholders could not exercise that discretion through the directors.

It will not do when a citizen of the state subscribes to the capital stock of a foreign corporation to say that he was ignorant of the terms of the act which created that corporation. He is presumed to know what those terms are. They are created by the law of another state, and he, for the purpose of assuming his obligation, in a certain sense goes into another state and casts off for the time the vesture which his own state throws around him, and puts on that of the other state, and is bound by the obligations which the legislature of that state has imposed upon the corporation, and the privileges which it has granted, and the conditions and terms of the grant. All these he is presumed to know, just as much as when he makes any contract to be executed by him in another state. When he makes a contract in Indiana which is to be executed in another state, he is bound by the laws of the state where the contract is by him to be performed. The laws of Indiana have all ceased to operate upon that contract when he enters into it upon the condition and understanding that its terms and obligations are to be controlled by the laws of another state. So here this defendant, when he entered into this agreement, did it with reference to the laws of the state of Illinois—the special act of incorporation which was passed in February, 1865. The well known maxim, of course, applies to him in this case, just as it does in relation to any law of Indiana—that ignorance of the law does not excuse him.

But, however this may be in relation to this special defense, every difficulty there may be in the way is, I think, removed by the replication made to it, which alleges that after the passage and taking effect of the amendatory act, the directors affirmed their previous action increasing the stock of the com-

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pany to five millions of dollars, and that the defendant did no act in repudiation or denial of his membership in the insurance company as a stockholder; but, on the contrary, until after the happening of the losses, the defendant continued to hold and retain his certificate of stock which had been issued to him by the company, and to participate in its affairs and profits, by aiding in the election of directors, and by receiving dividends declared on his stock. Now, this, I think, is a good reply to anything contained in this special defense.

It may be said, in conclusion, that the defense is not of a character to commend itself very strongly to the consideration of a court of justice. The company was unfortunate. Everything went on, as far as we can know—and we have the right to suppose so from the allegations contained in these pleadings—satisfactorily to the defendant until this misfortune happened. He made no complaint. He participated in all the advantages of the company, receiving dividends, and elected directors, but when the storm came—when this terrible fire swept away so many millions of property—and rendered this company bankrupt, and made it indispensable for those who had claims upon it to call upon the subscribers to the stock to meet their obligations in order to fulfill contracts of the company, then he complains—then he wakes up to all the various objections which are set forth in this answer.

Now under such circumstances, when this is the only fund that the policy-holders have to meet the losses which they have incurred, and the only way in which the bankrupt company itself can respond to their demands, it would seem unless there is an insuperable bar created by the law, that equity should be done in such a case as this. I see no such insurmountable obstacle in the way here to prevent the course of equity.

Decree for complainant.

A similar case came before Judge Dillon, Nelson, J., concurring, in the Minnesota District, in June, 1873. and he, after full argument and consid-

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eration, sustained the right of the assignee to recover the assessment on unpaid stock, and approved the above rulings of Judge Drummond. *Payson, Assignee vs. Stoecker*, 5 Chicago Legal News, 477, and 2 Dillon, 428. —[Reporter.

JULIAN J. DAVIS *vs.* CITY OF KENDALLVILLE.

CIRCUIT COURT.—DISTRICT OF INDIANA.—MAY TERM, 1873.

MUNICIPAL BONDS.

1. Where subscriptions of private citizens to the capital stock of a railroad corporation are taken up, and a subscription of the city substituted by consent, such an arrangement does not invalidate the city bonds unless the citizens had been deceived, or had voted or petitioned for the subscription under a misconception of the facts.

2. RECITALS IN BONDS.—Where bonds bear upon their face the statement that they have been issued in pursuance of law, and under the contingencies required by law, a *bona fide* holder is not bound to go back and examine all the intermediate steps taken prior to their issue.

3. BONA FIDE HOLDER. — He is not presumed to have notice of everything which takes place before the issuing of the bonds; and an averment that the proceedings of the city council were spread upon the records of the city is not sufficient to charge him with notice.

4. SUBSCRIPTION BY CITY — HOW PROVED. — A resolution of a common council declaring the subscription, and approved by the mayor, is sufficient to show a subscription by the city.

This was a suit by Julian J. Davis, as the holder of a number of coupons attached to a series of bonds amounting to \$83,000, issued by the defendant to the Grand Rapids and Indiana Railroad Company in payment for a subscription of stock to a like amount made by the city. One of the bonds was filed with the complaint, from the face of which it appeared that the bonds were for a "six per cent. loan in aid of the Grand

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Rapids and Indiana Railroad, authorized by a petition of a majority of the resident freeholders of said city, and resolutions and ordinances of the common council thereof in pursuance of law."

The several pleas are stated in the opinion. Demurrer to pleas.

C. P. Jacobs, for plaintiff.

The common council having determined that the requisite number of citizens had petitioned, plaintiff had a right to rely on their action in making the subscription. *Know County vs. Aspinwall*, 21 Howard, 539; *Bissell vs. Jeffersonville*, 24 do., 287.

L. M. Winder and *James A. Fay*, for defendant.

The city having no power to use money for purposes other than what are specified in its charter, cannot borrow for other purposes. Such contract would be *ultra vires* and void. *Smead vs. Indianapolis, Pittsburg & Cleveland R. R.*, 11 Indiana, 110; *Madison and Indianapolis R. R. Co. vs. Norwich Savings Society*, 24 do., 457; *Hulstend vs. Mayor, &c., of New York*, 3 New York, 430; *Hodges vs. City of Buffalo*, 2 Denio, 110. Power to borrow money for public purposes on city bonds, does not confer power to aid a railroad. *Chamberlain vs. The City of Burlington*, 19 Iowa, 395.

A contract for improvement by the city without formalities directed by the charter is void, and the contractor can neither recover on it nor on the common counts. *Johnson vs. City of Indianapolis*, 16 Indiana, 227; *City of New Albany, vs. Sweeney*, 13 do., 246; *Cowen vs. West Troy*, 43 Barbour, 48.

If a contract is void, the bonds issued in pursuance of it are also void, even in the hands of an innocent holder. *Marsh vs. Fulton County*, 10 Wallace, 676.

If the precise mode of entering into the contract directed by the charter is not complied with, the contract will be void. *Johnson vs. City of Indianapolis*, 16 Indiana, *supra*; *Bank*

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of *Augusta vs. Earle*, 13 Peters, 519, 587; *Head vs. The Providence Insurance Company*, 2 Cranch, 127.

For further authorities that a city cannot contract beyond the power given it, see *The Western Mass. Ins. Co. vs. Duffey*, 2 Kansas, 352; *Board of Commissioners of Tippecanoe Co. vs. Cox*, 6 Indiana, 405; *City of La Fayette vs. Cox*, 5 do., 39; *Kyle vs. Malin*, 8 do., 37; *City of Aurora vs. West*, 22 do., 96; *Starin vs. Town of Genoa* and *Gould vs. Town of Sterling*, 23 New York, 439; *McSpedon vs. Mayor, &c., New York*, 7 Bosworth, 601.

"The protection which commercial usage throws about negotiable paper can not be used to establish the authority by which it was originally used." *Marsh vs. Fulton County*, 10 Wallace, 676, 681; *Clark vs. Polk County*, 19 Iowa, 248, 252; *Brady vs. Mayor, &c., of New York*, 20 New York, 312; *Farmers', &c., Bank vs. Butchers and Drovers' Bank*, 16 do., 125.

DRUMMOND, J.—It is not disputed that under the statute the city had the right to borrow money and subscribe for stock in the railroad company, and to issue bonds for stock. I assume, then, that the city had this power. This being so, and the bonds bearing upon their face the declaration that they were issued in aid of the railroad company, and authorized by a majority of the freeholders of the city, they were *prima facie* issued in conformity with the law.

Various defenses have been set up in the case, but they all depend on a state of facts substantially as follows:

There had been a subscription to the stock of the railroad company by certain individuals, citizens of Kendallville and the adjoining country, through Mr. Samuel Hanna, the president of the company, to the amount of \$83,000; and by an arrangement between the railroad company and the city, it was understood that these private subscriptions should be taken up, and the subscription of the city substituted in their place by consent. All the defenses proceed upon this agreement

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as a basis, and that it was the consideration and motive which induced the city to subscribe for the stock.

In some of the pleas it is averred that this was the only consideration or inducement for the subscription by the city.

It seemed to be taken for granted during the argument, by defendant's counsel, that if the individual subscriptions were surrendered, and the subscriptions by the city substituted in their place, that this *ipso facto* would be a defense. I am not prepared to admit this without qualification. There might be circumstances which would render such a subscription by the city illegal, and be an answer to the action, but they should be such as would show that some unfair advantage had been taken of the city or the citizens in the transaction.

If there were certain stock subscriptions of the citizens of Kendallville made in aid of this railroad, it would seem there could be no objection to the company's releasing these private subscriptions if all parties consented.

No one could well make complaint in such case, and if the city should then subscribe for stock in the company, and if the subscription of the city was in fact substituted for the private subscription, and the citizens agreed to it, no one would be injured. If there was some secret trick by which the citizens were deceived, and the matter had been so arranged that the citizens had voted or petitioned for the subscription under a misconception of the facts, it might be inoperative. But if the facts were well known, and all parties understood it, I cannot see any objection to a subscription by the city on such a basis.

So, in examining the defenses, in addition to what has been stated, I must consider that if the matter was understood all around there could be no fraud or wrongful act in making the subscription. And in view of the many cases decided by the Supreme Court of the United States on the question of the validity of municipal bonds, I have to assume this as the settled law—that where bonds bear upon their face that they have been issued in pursuance of law, and under the contingencies

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required by the law, and which have been left to the local officers to determine, and the bonds or coupons have come into the hands of a holder for value, it is not necessary for him to go back and examine all the intermediate steps taken, to see whether there has been any flaw or irregularity. The only question is one of power, and if the power is given under certain circumstances, I must assume after the bonds are issued and held *bona fide*, that they were rightfully issued. It follows, then, that the special defenses should allege something more than the surrender and substitution already mentioned. For when the stock was issued and the city clothed with the rights of a stockholder, it is not enough to say that these were the motives upon which the subscription was made and the bonds issued.

A party is not presumed to have notice of everything which takes place before the issuing of the bonds, and it is not enough to say that the proceedings of the city council were spread upon the records of the city. The averment ought to be that the plaintiff had actual knowledge of matters which might constitute the defense.

The first plea is the general denial, which presents a proper issue.

The second plea avers that Mr. Hanna had procured these individual subscriptions of citizens, which were afterward canceled, and the city issued its bonds as set forth in the record, a copy of which is attached to the pleas, and of which therefore we can take notice; that plaintiff took the coupons after they became due, and therefore had notice, etc.

This defense does not go far enough. It may be true, and yet the subscription by the city be legal. The record of the proceedings clearly shows a subscription by the city, by resolution of the council and approval of the Mayor, to the stock of the company. Some objection is taken in the argument that this does not show a subscription. Why not? What more solemn step in the matter could the city take than that set forth in the resolutions and ordinances adopted by the council?

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The third defense is similar, and alleges notice by the city's record, which is insufficient. In fact, all the pleas numbered five, six, seven, eight and nine are defective for a similar reason.

The fourth plea avers notice, but does not aver facts sufficient to constitute a defense. I hold there must not only be the substitution of one subscription for another, but there must also be some deceit practiced upon the citizens, for if they do it with their eyes open no one can make any objection.

If there were a plea that this agreement was the only consideration for the bonds; that the city made no subscription and received no stock; and that plaintiff had notice,—it might be good. But here the fourth plea in fact admits, by not denying it, that the city received the stock of the company in exchange for the bonds, which stock became its property. This stock was a valuable consideration. The plea is therefore insufficient; and it may be added that the averment in one of the pleas, that the plaintiff took the coupons after they were due, is not enough without the other averment that some fraud or deceit had been practiced upon the citizens or the city. It is said that the city bonds would be more available to the railroad company than the private subscriptions of the citizens, and this may well be true, and yet if the citizens, knowing all the facts, did not at this time complain, they can not now be heard.

The tenth plea is held to be bad for the reasons given by the court in the case of the *Republic Life Insurance Company vs. Withers*,¹ decided at the present term.

The demurrers of plaintiff to the second, third, fourth fifth, sixth, seventh, eighth, ninth and tenth pleas of the defendant are therefore sustained. If the defendant's counsel think they can make the pleas sufficient by amendment, they may take reasonable time to do so, but it may be a serious question whether the city's liability is not fully fixed by its records.

¹ *Ante* p. 269.

Davis vs. City of Kendallville.

A State Legislature has the right, unless specially prohibited by the Constitution, to authorize municipal corporations to subscribe for the stock of a railroad company, and to issue their bonds therefor. If such authority is conferred to be exercised in a special manner, and it appears upon the face of the bond by recitals that the power was exercised in the manner required, proof that any or all of such recitals are incorrect will not constitute a defense to the bonds in the hands of a *bona fide* holder. *St. Joseph Township vs. Rogers*, 16 Wallace, 644; S. C., 7 Albany Law Journal, 362.

Though mere informalities in the issue of municipal bonds, avail nothing as against *bona fide* holders, yet where the bonds are issued without any authority or right, though reciting on their face facts essential to their due issuance, they are void as against everyone. Dillon on Municipal Corporations, § 108; *Pendleton County vs. Amy*, 13 Wallace, 297, 304; *Superrisors Marshall Co. vs. Cook*, 38 Illinois, 44; *Marsh vs. Fulton County*, 10 Wallace, 676; *United States vs. City Bank of Columbus*, 21 Howard, 353, 364; *Starin vs. Town of Genoa*, and *Gould vs. Town of Sterling*, 23 New York, 439; *contra* (seemingly), *Lynde vs. The County*, 16 Wallace, 6; *Bissell et al. vs. City of Kankakee*, 64 Illinois, 249.

Consult also *Mygatt vs. City of Green Bay*, Vol. 1 of this series, p. 292; *Luling vs. City of Racine*, Id., 314; *Schenck vs. Supervisors of Marshall County*, Id., 533; *Goedger vs. Supervisors of Manitowoc County*, 2 do., 328; *Nugent vs. Putnam County*, 8 do., 105; and *Portsmouth Savings Bank vs. Town of Yellow Head*, Id., 474, and notes to those cases.—[Reporter.

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***In re* INDIANAPOLIS, CINCINNATI & LA FAYETTE
RAILROAD COMPANY.**

CIRCUIT COURT—DISTRICT OF INDIANA.—MAY, 1873.

IN BANKRUPTCY.

DISMISSAL OF PROCEEDINGS.

1. WHERE MAJORITY OF CREDITORS DESIRE IT AND OFFER TO SECURE CLAIMS OF THOSE OBJECTING. — Where the stockholders of a bankrupt railroad company purchase in good faith all the outstanding floating indebtedness of the company, except a few minor claims, and all the creditors, except those representing these few claims, desire such a result, they should be allowed to have the bankruptcy proceedings dismissed, on giving proper security for the payment of the objecting creditors.

2. WHEN FOR BEST INTERESTS OF ALL PARTIES. — It being evidently for the best interests of all parties, and the desire of a large majority, that the corporation be managed in the customary manner, the bankrupt court will not retain the custody and control of its property, to assist minor creditors in coercing their claims.

3. A BANKRUPT COURT HAS FULL EQUITABLE DISCRETION—and can allow a case to be withdrawn, provided it is done without prejudice to the interests of any party.

4. THE PROPER PRACTICE—in such case is to require the deposit of adequate security for the payment of the claims of the non-assenting creditors, to remain until any contingency about them is ultimately settled by the highest court to which a case can be taken; the claims to be prosecuted with reasonable diligence.

This was a petition under the second section of the bankrupt act, by the Whitewater Valley R. R. Co., a creditor of the bankrupt, for the review of an order of the District Court dismissing the proceedings in bankruptcy, on the motion of all the creditors except the petitioner and Charles Dwight.

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The order of the District Court required security for the payment of Dwight's claim, but made no provision for securing whatever claim the petitioner might be able to establish against the bankrupt.

Prior to the commencement of proceedings in bankruptcy in this case, some of the stockholders of the bankrupt company, under a special law of Indiana, had filed a bill in the state court for relief against the company, on the ground that it had become insolvent, and receivers were appointed by the state court to take charge of the property of the company, and, under the order of the court, went into possession of all its effects. On the 5th of May, 1871, a petition in bankruptcy was filed against the company. Between the date of filing the petition and the adjudication of bankruptcy by the District Court, on the 8th of November, 1871, the case in the state court was transferred to this court under the acts of Congress of July 27, 1866, and March 2, 1867, and the receivers appointed by the state court were recognized by and continued to act as receivers under the authority of the Circuit Court, and when the proceedings in bankruptcy were commenced the usual order to take possession of the goods of the bankrupt was not put in force, for the reason that the property was in the hands of receivers.

After the transfer of the case to the Circuit Court of the United States, various parties intervened and filed bills and cross-bills, claiming to be bondholders under mortgages which had been given by the company prior to the commencement of the proceedings in the state court, and which it was conceded were valid and prior liens against the railroad company, both as to the stockholders who commenced the proceedings in the state court, and as to the parties who commenced the proceedings in bankruptcy in the District Court.

The value of the property and effects of the company was between twelve and fifteen million dollars.

Independent of the bonded debt of the company there was

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at the time of the commencement of these various proceedings a large floating debt, amounting to nearly a million dollars.

On the 13th of February, 1873, a petition was filed in the bankrupt court to vacate the proceedings in bankruptcy, by certain parties who represented themselves as trustees of the stockholders, and who, as appeared from the statements in the petition, and which were not controverted, had been so appointed for the purpose of buying up all the floating claims against the company by means of a fund which had been voluntarily advanced for that purpose by the stockholders; and they had accordingly bought up all these various claims with the exception of one contested claim of about ten thousand dollars, due to Charles Dwight, and a claim of the Globe National Bank against the bankrupt company as acceptors of sundry bills of exchange held by the bank. They also stated in their petition that all the various creditors, including the bonded creditors and the Globe National Bank, and all the creditors of the floating debt which they represented, desired that the proceedings in bankruptcy should be superseded, and the company be once more permitted to take possession of its property and effects; the only party dissenting to this arrangement being Charles Dwight. When this petition was filed by the trustees of the stockholders, Dwight appeared by counsel and objected to granting the order to supersede the proceedings in bankruptcy on various grounds. The Whitewater Valley Railroad Company also appeared and objected to the prayer of the petition of the trustees for the reason that they had previously made a contract with the Indianapolis, Cincinnati and Lafayette R. R. Co., by which the latter had run the railroad of the Whitewater Valley R. R. Co., stating that there were various claims existing or contingent, for which the Indianapolis, Cincinnati and Lafayette R. R. were liable under their contract. It was not stated who were the owners of these claims, nor the amounts, nor on what grounds they were payable, except in a general way that they were for the right of way, and for stock that had been injured in the oper-

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ation of the road while leased by the bankrupt company.

The petition of the trustees to the District Court, while denying the validity of Dwight's claim, proposed to make provision for its ultimate payment if it should be sustained before any competent court. The District Court made an order superseding all the proceedings in bankruptcy, but requiring as a condition a deposit of United States bonds sufficient to secure Dwight's claim (which deposit was in point of fact made by the trustees), but making no provision whatever for any claim which might be found due the Whitewater Valley R. R. Co. To review this order of the District Court the Whitewater Valley R. R. Co. filed this petition under the second section of the bankrupt law, on the ground that the claim of Dwight had been proved, among a large number of other claims, in the District Court, and before the order was made superseding the proceedings the petitioner had also presented its proof of a claim as drawer of the bill of exchange held by the Globe National Bank, a portion of which had been paid to the bank, and insisted that there could be no dismissal of the proceedings in bankruptcy while any claim was pending in the District Court, and especially when there was no provision made for the claims of the petitioner; that it was not competent for the District Court to retain as a fund of the bankrupt and subject to its disposition the bonds which were deposited for the security of Dwight; that the proceedings should have been retained, or else entirely dismissed.

Porter, Harrison & Hines, for petitioner in review, cited: *In re Sherburne*, 1 Bankruptcy Register, 155; *In re Boston, Hartford and Erie R. R. Co.*, 6 do., 209; *In re Ellerhorst*, 5 do., 144.

Hendricks, Hord & Hendricks and *Joseph E. McDonald*, for respondents, cited, *In re Miller*, 1 Bankruptcy Register, 105.

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DRUMMOND, J.—It is to be observed that there was no property in possession of the bankrupt court. Assignees had been appointed, but they were nominal and were the same persons that were receivers under the order of the state court, and that of the Circuit Court of the United States; and all the property of the bankrupt was held by the receivers of the road, managed by them, and, of course, subject to all valid liens subsisting against the company; and if the property had been ultimately controlled by the bankrupt court, it, of course, would have been disposed of in such a way as to marshal the different claims and liens existing against the road, and they must have been paid according to their priority, the bondholders confessedly holding the first lien.

It was to avoid the sacrifice of so much property, which it was thought would be necessarily incurred if it remained in the bankrupt court, that the stockholders made the arrangement which has been referred to, and which was assented to by all the creditors except only Charles Dwight and the Whitewater Valley R. R. Co., and the question is, whether with such an immense property, with so many and various liens and incumbrances upon it, and such a great preponderance, both in numbers and amounts, of those holding these liens, desiring the withdrawal of the case from the bankrupt court, it should be prevented by the opposition of the two creditors already named. It is quite clear that if the case had been wound up in the bankrupt court, and the property disposed of, the probability of its realizing anything for the two non-assenting creditors would not have been very great, as all these other claims would have first to be paid; and, in fact, there would be great doubt, perhaps, whether any portion of the floating debt would be paid, under which, of course, would be included that of the two non-assenting creditors, and, therefore, it may be a question whether it was not most for the interest of those non-assenting creditors themselves that the case should be withdrawn from the bankrupt court, and some arrangement made by which their claims

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could be satisfied, and thus leave this large property in the control of the company, with the assent of the other creditors, to be made available, if it can be, for the ultimate payment of the claims which might be brought against it.

It is also a question, whether, in a case like this, it is for the interest of all the various parties that the property should remain in the bankrupt court, or be withdrawn from it. For example, there could be no controversy that it would be entirely competent for the party against whom a decree in bankruptcy was made, with the assent of all his creditors, to withdraw it from the bankrupt court, and the question is, whether the opposition of an insignificant portion of the creditors can prevent that result. I think that the bankrupt court, as a court of equity, has a full equitable discretion upon this subject, and can allow a case to be withdrawn from it, provided it is done without prejudice to the interests of any of the parties, debtors or creditors, who are before it. And in this case I think it was competent for the bankrupt court to allow the case to be withdrawn from it, protecting the interests of the different non-assenting creditors. And if the court had given the same protection to the claims of the Whitewater Valley R. R. Co. that it did to that of Dwight, this court would not feel inclined to interfere with the decree. The reason why the District Court made a distinction between the claims of the two non-assenting creditors was undoubtedly because that of the Whitewater Valley R. R. Co. was not set forth so distinctly as the other, being somewhat vague and uncertain, and depending more or less upon contingencies. But it seems to me, as long as there was a creditor who *prima facie* had a claim against the bankrupt company which was liable to be proved, before the court could dismiss the proceedings it should have given some security or protection to that claim. And it will be recollected that there was an allegation, which was not denied, that the Whitewater Valley R. R. Co., had paid a considerable amount as drawer of bills of exchange, held by the Globe National Bank, and which, therefore, was

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a distinct and positive claim, either legal or equitable, against the bankrupt. And it is further to be observed, perhaps, as a reason why the District Court made a discrimination between the claims of the non-assenting creditors, that the proceedings in bankruptcy had been pending some time; that all the other claims had been proved in the bankrupt court except that of the Whitewater Valley R. R. Co. Some excuse is given for the fact that these claims of the latter company were not proved in bankruptcy, that one of these assignees, who was also one of the receivers, had requested that the proof should be postponed and should not then be presented in the bankrupt court.

On the whole, then, it seems to me, that if the proper protection can be given to the claims of Dwight and of the Whitewater Valley R. R. Co., it would be unwise, and contrary to the best interests of all concerned, for the property to remain in the bankrupt court; and that it is desirable that it should be restored to the company, to enable it, with the aid and co-operation of all the principal creditors and that of the stockholders, to endeavor to retrieve itself from its present embarrassments. The property is very large, the business done is apparently quite profitable, and there is certainly strong reason for supposing that with time the company may be able to extricate itself from the load of debt which now oppresses it. It seems to me, therefore, nothing more than the exercise of a reasonable equitable power which rests in the bankrupt court, to allow the case to be withdrawn from its jurisdiction under circumstances like these, and giving adequate security to one or two parties holding claims, who are opposed to the withdrawal, from causes which do not fully appear, and which are either real or imaginary, but the prominent object of whose opposition is to coerce some settlement from the great mass of the creditors. Therefore, this court, while conceding the correctness of the principle upon which the decree of the District Court was made, will modify its order dismissing the proceedings in bankruptcy, and will

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This was a libel filed by the Northwestern Union Packet Company, as owner of the steamboat Mollie Mohler, against the steamboat W. H. Clark, to recover for damages sustained by the steamer Mollie Mohler, by collision with the W. H. Clark, near the bridge at Winona, Minnesota, on the Mississippi river, July 21, 1872, while the Mollie Mohler was engaged in towing a raft of logs from Beef Slough, in Wisconsin, to Rock Island, Illinois. Jeremiah Turner filed a claim as owner, and answered the libel.

The facts are fully stated in the opinion.

William Hull, for libellant, made the following points, and cited the authorities as sustaining them:

I. The master and crew of the Clark had entire control of both boat and raft, consequently the collision is as directly attributable to her as if she collided with the Mohler. *The Express*, 1 Blatchford, 365; *The Hector & The Wisconsin*, 4 Blatchford, 199; *Pope vs. The R. B. Forbes*, 1 Sprague, 328; *S. C.*, 1 Clifford, 331; *Owners of Brig James Gray vs. Owners of Ship John Fraser*, 21 Howard, 184; *The Steamboat Rescue*, 2 Sprague, 16; *New York and Baltimore Transportation Co. vs. Philadelphia and Savannah Steamboat Navigation Co.*, 22 Howard, 461; *Sturgis vs. Boyer*, 24 do., 110; *The Maria Martin*, 12 Wallace, 31.

II. As both boats were going in the same direction, the Mollie Mohler could keep her course, and the Clark should have avoided her. *New York and Liverpool U. S. Mail Steamship Co. vs. Rumball*, 21 Howard, 372; *Chamberlain vs. Ward*, Id., 548; *The Chesapeake*, 5 Blatchford, 411; *The Carroll*, 8 Wallace, 302.

The pursuing boat must, in passing, select a safe course at her peril. She has only the unoccupied water-way, whether stationary or moving with less speed than the passing boat. *The Rhode Island*, Olcott, 505; *S. C.*, 1 Blatchford, 363.

The rear boat is not justified in coming within hazardous proximity to, or in crowding, the leader. If she does, she is

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liable for damages. *The Steamer City of Paris*, 1 Benedict, 174.

The Clark should have allowed the Mohler to continue her course and stopped in time. *Ward vs. Dousman*, Newberry, 236.

Precautinary measures must be taken in time. *The Governor*, 1 Clifford, 93; *Steamer Louisiana vs. Fisher*, 21 Howard, 5.

Varying movements of the Mollie Mohler, whereby the Clark was misled, will only excuse a departure from the rule. *The Hausa*, 2 Benedict, 299.

Various classes of collision defined. Abbott on shipping, 229. *The Pacific* and *Brig Fushion*, Newberry, 8; 1 Parsons on Shipping and Admiralty, 525.

This was not an "inevitable accident," and could have been prevented by ordinary care. *The Baltic*, 2 Benedict, 452. It was not "mutual fault," as the Mohler contributed not in the least.

The Clark was culpably negligent in trying to tow a raft she could not manage. *The Helen R. Cooper* and *The R. L. Mabey*, 2 Benedict, 67; *S. C.*, 7 Blatchford, 384; *The Steam Tug George Farrell*, 4 do., 316; *The Syracuse*, 12 Wallace, 167.

The Clark's negligence being proven, the *onus* is on her to prove that the collision was not caused thereby, and that it would equally have happened had she performed her duty. *The Anita vs. Steamboat Anglo Norman* and *Birk June E. Williams*, Newberry, 492; 1 Conkling's U. S. Admiralty, 383.

Libellant's witnesses on the Mohler deserve greater credit as to her management than those of the Clark, or others not knowing the facts. *The Empire State*, 1 Benedict, 57; *Pope vs. The R. B. Forbes*, 1 Clifford, 338; *The Narragansett*, Olcott, 246; *The Neptune, Id.*, 483; *The Rhode Island, Id.*, 505; *The Bay State*, 3 Blatchford, 48; *New York and Liverpool U. S. Mail Steamship Co. vs. Rumball*, 21 Howard, 372, 382.

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A *quasi* custom cannot vary the law. *The Clement*, 2 Curtis, 363.

Damages should be for:

1. Raising, towing, dockage and repairing of the *Mollie*.
2. A *per diem* compensation for loss of boat's services, at the rate hired, while necessarily being repaired. 1 Conkling, U. S. Admiralty, 385; *The Narragansett*, Olcott, 388; *The Rhode Island*, Id., 505; *The Cayuga*, 2 Benedict, 125; S. C., 7 Blatchford, 385; *The Fuvorita*, 4 do., 132; *Santee*, 6 Blatchford, 1; *Williamson vs. Barrett*, 13 do., 101—111; *The Baltimore*, 8 Wallace, 377; *Sturgis vs. Clough*, 1 do., 269; 1 Parsons on Shipping and Admiralty, 538.

Immaterial whether the vessel was weaker or stronger, 1 do., 543; *Amoskeag Manufacturing Co. vs. Steam Ferry Boat John Adams*, 1 Clifford, 404; *The Granite State*, 3 Wallace, 310.

Offering or rendering no assistance to the injured vessel is a circumstance tending to show consciousness of fault. *The Atlas*, 4 Benedict, 27.

Whether raft is subject to admiralty jurisdiction, see *Tome vs. Four Cribes of Lumber*, Taney C. C. Decisions, 533.

J. Hamilton Davis and *Huyh Cameron*, also for libellant.

Thomas Wilson, for respondent.

The raft only is liable, the boat being employed solely and only as a motive power, and being exclusively under the management of the raft's master and crew.

Proceedings in admiralty may be had against a raft. *The Rock Island Bridge*, 6 Wallace, 213; *A Raft of Spars*, Abbott's Admiralty reports, 291, 485; 16 U. S. Statutes at Large, §47, p. 453—4.

If it was illegal for the Clark to tow a raft she could not handle, the same is true of the *Mollie*, for she could not handle herself, and the court will in such cases leave the parties where it found them. *The Leopard*, 2 Ware (Davies), 197;

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1 Parsons on Shipping & Admiralty, 528 and cases cited; *Sturgis vs. Clough*, 21 Howard, 45.

The damages cannot be divided, as the Clark was not negligent, and if it admitted of a reasonable doubt even, the loss must be borne by the party on whom it falls. *The Grace Girden*, 7 Wallace, 196, 203.

The respondent must be affirmatively and specifically held in fault to allow damages. *Bogle vs. Schooner Breeze*, 6 American Law Review, 762; 1 Parsons on Shipping and Admiralty, 328-9; *Wm. Young*, Olcott, 38, 41; 3 Greenleaf on Evidence, § 404.

The libellant must prove herself clear of fault, and also culpable negligence or actual misfeasance against the other to recover for a collision. *Steamboat Relief*, Olcott, 104; *Fashion vs. Wards*, 6 McLean, 152, 157; *The Columbus*, Abbott's Admiralty, 384; *The Marpesia*, 7 American Law Review, 287; *Schooner Anita vs. Steamboat Anglo Norman and Bark Jane E. Williams*, Newberry, 492-4; *The Steamship United States*, Id., 497-500.

If neither party is in fault the loss rests where it falls. *The Eliza and Abby*, Blatchford & Howland, 435, 441; 1 Parsons on Shipping and Admiralty, 525. The same of an inevitable accident. Id., 525, and note.

The law exacts of officers only ordinary foresight and skill. *The Eliza and Abby and Grace Girden*, *supra*, Shearman and Redfield on Negligence, §§ 29, 30, and 31.

Guy C. Prentiss, also for respondent.

HOPKINS J.—If I were to believe the testimony given on each side, in this case, I should have to find that there was no collision, for if the witnesses testify truly, it was entirely impossible that the boats could have got together at that point; but taking the collision as established and admitted, I have, after a great deal of consideration and examination of the testimony, maps, plats, diagrams and distances from the bridge, elevator and other monuments in that vicinity, arrived at a

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conclusion, quite satisfactory to my own mind, as to the manner in which, and through whose fault, the collision occurred. The Mohler, at about four o'clock on the morning of the 31st of July, 1872, started with her tow, a raft of logs, about 110 feet wide by 450 feet long, from a point about four miles above the Winona bridge across the Mississippi river. The steamer W. H. Clark, about the same time in the morning, started at a point about four miles above with her raft, an eight-string lumber raft, being about 136 feet wide by 450 feet long. The Mohler was commanded by C. H. Jewell, a licensed pilot, and the Clark by Mr. Turner, a licensed pilot, the claimant in this case. The Mohler, owing to an injury to her raft the evening before, did not tow ahead with her wheel, but floated with the current in order to give the hands an opportunity to repair her raft. The Clark followed after her at nearly double her rate of speed, so that when the Mohler arrived at the bar opposite the elevator, about 1,000 feet above the bridge, the Clark had arrived at the point of Rolling Stone Island, a distance of only 1,800 feet from the Mohler, and following in her track. The bow of the Mohler, after going over the reef, was thought to be too far out in the stream to go through the west draw of the bridge with safety, and thereupon the Mohler, in order to straighten it with the stream, backed her wheel, by which the bow was thrown in by the current; in doing which, some detention occurred, and the Mohler did not move as rapidly as the current. The Clark followed on in the same course, gaining rapidly upon the Mohler, and when it reached the reef opposite the elevator and turned the bow of its raft to run through the west draw, the bow of its raft was not to exceed 200 feet from the stern of the Mohler, and was going much more rapidly than the Mohler. At that time the danger of the collision became imminent to the persons in charge of both boats. The Mohler, having her raft straightened up, went ahead on her wheel, but before she had made many revolutions or produced much effect upon its motion, she had to stop, as the bow of the Clark's

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raft was getting so close as to endanger her wheel. The Mohler and her raft then floated with the current until the collision. The captain of the Clark, when opposite the elevator, seeing, as he says, that he was rapidly gaining upon the Mohler and coming in dangerous proximity to her, gave a signal with his whistle to put out a line, changed the position of his boat so as to assist to land his raft, and also gave signal whistles to the oarsmen on the bow to throw in the bow, and gave orders to snub the raft and land it as quickly as possible, so as to avoid collision with the Mohler; that the line was put out and fastened to the piling just below the elevator, as he could not land in front of the elevator on account of barges tied there. The speed of the raft was not checked until it passed by the stern of the Mohler, and struck her with a forward and flanking-in motion about five feet forward of her stern post and broke a hole in her hull about ten feet long and twenty inches wide, from the effect of which she immediately filled with water and sank, and was dragged by the current and raft through the pier below the bridge and was there left in water about up to her upper decks. The raft of the Clark was stopped by the line and the collision, and in a short time after passed between the piers and by the Mohler on her course. The current below the reef was at the rate of two and a half miles an hour, and from Rolling Stone Point to the reef from $3\frac{1}{4}$ to 4 miles. The pilot on the Clark testified that she did not go ahead on her wheels at all after they left the Point until the collision, except a few strokes just before the collision, to aid them in landing their raft, to avoid it.

The question to be first determined is whether either party was at fault, and if so, which. That must be solved by the application of certain well-settled rules of law relating to boats in such cases. In the first place, I regard it as settled beyond controversy that when two steamboats are going in the same direction the one ahead is entitled to keep her course, and it is the duty of the pursuing boat to avoid her. This rule, however, does not go to the extent of justifying the lead-

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ing vessel in suddenly changing her course so as to embarrass, or throw herself across the track of the pursuing boat. The 17th article of the act of Congress of April 29, 1864, provides¹ that "every vessel overtaking another vessel shall keep out of the way of said last-mentioned vessel;" but the 18th, 19th and 20th articles provide that due regard shall be had to the circumstances of each case.² But I do not see in this case that the Mohler was guilty of any sudden change, or maneuver calculated to embarrass or change the course pursued by the Clark. It is true she backed after passing over the reef, to straighten her raft, as her pilot says, so that she could go through between the piers of the bridge safely. Mr. Hanks, a very intelligent and experienced pilot, called as a witness on the part of the respondent, testified that the current at the reef is such, that "the bow of a raft is often thrown out a little, and as it goes over it turns again towards the Minnesota shore, and sometimes we have to back up under the reef to straighten our raft before going through." From this it appears that backing in the manner the Mohler did is not unusual at that place.

The doctrine in relation to the rights and duties of vessels going in the same direction is very fully stated in the case of *Whitridge, et al. vs. Dill, et al.*, 23 Howard, 448, in which case the opinion of Judge Betts, in the case of *The Governor*, Abbott's Admiralty Reports, 108, is quoted approvingly, and in which he expresses the rule as follows: "But from the fact that they were running in the same direction, the one astern of the other, there is imposed upon the rear boat an obligation to precaution and care which is not chargeable to the same extent upon the other. * * * The rear boat in such case must stop her way or back off and await the opening of a sufficient passage, if the leading boat is so placed that safe

¹ 13 U. S. Statutes at Large, 61.

² *The Grace Girdler*, 7 Wallace, 196.

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room is not left to pass without coming within a hazardous proximity to her."

The general law of navigation secures to vessels under way the track they are rightfully pursuing, and makes it cause of damage for others to molest or crowd upon them in it.

This rule would not allow the leading boat to unnecessarily obstruct the navigation, or to maneuver with a view to embarrass the boat following, and there is nothing in the testimony in this case to warrant the conclusion that the Mohler did anything to obstruct the navigation, and as there was no chance for passing at that point, the Clark should have kept back a proper distance to have avoided all possibility of a collision. The rule upon that subject, as laid down in the case of *The Carroll*, 8 Wallace, 302, 306, is as follows: "The safeguards against danger, in order to be effectual, must be seasonably employed, and in this case they were not used until the danger was threatening." The same remark is applicable to this case, for here when the danger became imminent, the respondent did all he could to avoid it, but his efforts were unavailing because too late. The court in that case also say its greater fault was in suffering the vessel to get into such dangerous proximity at the moment preceding the collision, and as she has furnished no excuse for this misconduct she is chargeable with all the damages resulting from the collision. This respondent, judged by that rule, is equally liable, for his fault was in following too close to the Mohler. In a place of that description, where the passage was too narrow to allow one vessel to pass the other, her pilot should have kept her back a sufficient distance to avoid accidents or unavoidable delays in the navigation of the Mohler; and here the question arises as to what course he could have pursued to avoid it? Upon this question the testimony of experts is very conflicting and unsatisfactory. The witnesses on the part of the libellant testify that he could have landed his raft at various points below Rolling Stone, and above the elevator,

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and Mr. Register, an old and experienced pilot, testifies that he has often landed floating rafts between those points.

The libellant's witnesses also testify that at Rolling Stone Point, or at any point until he got to the reef, he might have changed his course and gone through the east draw, that the water and passage were as good through that as through the west, except that it was a little safer and easier to steer by the land than by the piers alone; while the claimant and his witnesses testify that it would have been very hazardous, if not impossible, to have landed above the elevator, and that in order to have gone through the east draw it would have been necessary to have changed the course at the point of Rolling Stone Island, and that they would deem it hazardous to run the east draw with an eight-string raft; but I do not understand any of them to state that it would have been impossible. It would doubtless require more skill than to run by the shore, but as the center pier extended up the river for some distance above the bridge, and was planked up solid, so as to avoid all danger of catching in case the raft should strike against it, I cannot regard it as an undertaking of sufficient hazard to justify him in crowding upon the Mohler in order to avoid the risk of running through the east draw. Indeed, Mr. Davidson, an experienced pilot in running rafts both by boat and floating, and who manifested great candor and impartiality in his testimony, testified that he had run an eight-string raft through the east draw without trouble. He also stated that "it would have been difficult for the Clark to have gone through the east draw, starting at Yeoman's Mill (which is about 600 feet below Rolling Stone Point); but I think it could have been done, and situated as those boats were, if I had apprehended any danger, it would have been safer to have undertaken to go through the east draw." I think this testimony shows that the passage through the east draw was not impracticable by any means, and under the circumstances I think the respondent should have essayed its passage. The testimony shows that rafts did run through it, and the claimant swears

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that he had run it on other occasions himself, so I cannot find, under the testimony, that the passage through the east draw was impracticable with an eight-string lumber raft, or that it was impossible to have landed it above the elevator and below the point of Rolling Stone Island, or that the danger in attempting to do so was sufficiently imminent to excuse him from trying to do either to avoid the collision.

But it is contended on the part of the claimant, and with a good deal of plausibility, that he did not apprehend any danger of a collision until after he had got far below the point where he could make that passage, and if the Mohler had kept on as she ought to have done, he would not have overtaken her, but I cannot view the case in that light. He had been following the boat all the morning, and knew that he was going about as fast again as she was, that in two hours he had gained upon her nearly four miles that morning, which was enough, in my opinion, to put him on his guard, and to require him to adopt timely precautions against danger, especially as they were approaching a place where to pass would be impossible,

I think the facts were sufficient to cause apprehension on the part of the claimant. He was negligent in not comprehending the dangers of the situation. That there was danger to be apprehended, the event demonstrated, and he, as an experienced seaman, should have taken timely precautions to avoid it; and not having done so, I think the respondent is liable for all the damages occasioned by the collision. I think the Mohler was not managed in the most skillful manner. Her pilot might, perhaps, have gone faster than he did with safety, but that question under the law was left largely to his discretion. He was ahead and had the right of way, and had the right to be cautious, and I do not see any such abuse of that right as to justify me in holding that the Clark had the right to run into his boat, or in dividing the loss, which at the time of the conclusion of the argument I felt strongly inclined to do.

Having determined that the libellant is entitled to recover

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for the injury of the offending party, it becomes necessary to ascertain whether it is the boat or the raft that is liable. The respondent contended that it was the raft; that the boat was but the mere agent of the raft, and under the exclusive control of the officers of the raft.

The raft had no motive power of its own. It would float with the current of the stream and be borne along with it, but in and of itself it had no motive power or contrivances for utilizing any power to promote its propulsion. The steam-boat was therefore employed to propel it and manage it, or, in other words, to navigate it.

A block called a "butting block" was placed on the stern of the raft, against which the steamer pushed with its bow to move it ahead. It had a line called a "backing-line" fastened to the raft and the bow of the boat to enable the steamer to back the raft. It had guy lines attached to each side of the stern of the boat, running around each rear corner of the raft to a capstan stationed in the centre of the raft to steer the raft by. The position of the boat to the raft was fixed and regulated by the use of the capstan and those guy lines. In that way the boat was made to apply its power directly or obliquely so as to propel the raft straight ahead or to the right or left, as the necessities of the case might require. It was not only therefore the motive power, but was the steering or directing power.

The boat was run and managed by Mr. Turner, a pilot licensed to run tow-boats. He alone had authority in law to run the boat. The boat was licensed and duly enrolled as a tow-boat, and as such was within the regulations prescribed by the acts of Congress.

The signals to the crew for managing the raft proceeded from the pilot-house, and the pilot in charge of the boat gave them by sounding the boat's whistle. The raft had no pilot other than the pilot of the boat. He had the direction of the whole craft, boat and raft, and gave all the directions for its

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navigation The boat had no master but its pilot, and the raft had neither pilot nor master distinct from the boat.

I think, therefore, the boat was liable, and that the claimant is mistaken in supposing that the boat was under the exclusive direction of the officers and crew of the raft. I think the case comes under the third rule laid down in *Sturges vs. Boyer*, 24 Howard, 122, that "when the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which for the time being has neither her officers nor crew on board, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels." That, I think, describes the position of the boat and tow in this case. See also the *Maria Martin*, 12 Wallace, 44.

This view is strongly supported by the evidence of the respondents expert witnesses showing what experience and knowledge is requisite for a pilot to run a raft with a steamboat. They testify that a steamboat pilot cannot run a steamboat with a raft in tow, nor can a raft pilot run a raft towed by a boat; that to run a boat towing a raft a peculiar knowledge and skill is necessary, which can only be acquired by a long experience in that service. The libellants dispute this, but all admit that it is a new method of moving rafts, and that the rafts are under the control of the pilot of the boat; that he is expected to combine the requisite skill to navigate both, and both are under his control as master, and the whole is under and subject to the control of the boat in which the motive power employed resides. The steamboat, therefore, is the active thing, and consequently is to be treated as the offender, and held liable for damages that it should have prevented by a judicious and careful management of the raft.

The counsel for the claimant contended with great earnestness and apparent confidence that, as the account of the expenses of the boat and officers of the boat were charged to the raft, this was a controlling circumstance in determining

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which was the principal and which the agent. But that circumstance failed to impress me at the time as possessing much significance, and further reflection has not changed my first impression. The owners of the raft had to pay the tow-boat for her services, and the mere form or method adopted by them in keeping that account is quite immaterial. It was well enough to charge it to the raft, as in that way they could conveniently ascertain the cost of the lumber and determine at what price they would have to sell it to clear themselves. It was a convenient mode of keeping their accounts, not at all affecting the relation of the boat to the raft in a maritime sense.

I have thus far considered the question as if the raft could be held liable in admiralty for an injury of this character, but I do not intend to pass upon this question. In the view I have taken of the relation and liability of the boat, it is not necessary. But from the examination I have given it, I do not at present see upon what principle admiralty jurisdiction could be sustained against a raft of lumber.

Chief Justice Taney in *Tome vs. Four Cribs of Lumber*, Taney's Circuit Court Decisions, 547, says: "They are not vehicles intended for the navigation of the sea. They are not recognized as instruments of commerce or navigation by any act of Congress; they are piles of lumber and nothing more, fastened together and placed upon the water."

Notwithstanding the great extent of rafting lumber upon the navigable streams in this country, I cannot find a case where they have been proceeded against in admiralty, except that case and the cases in Abbott's Admiralty Reports, 291 and 481, which were all salvage cases.

It is true the Judge in delivering the opinion in the case of the *Rock Island Bridge*, 6 Wallace, 213, says: "A maritime lien can only exist upon movable things engaged in navigation," and in enumerating them mentions "rafts" among others, but the question involved in this case was not before

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the court, and that part of the opinion may not therefore be considered as authoritative.

But as I do not deem it necessary to decide this question I shall not pursue the argument further. I have only said this in deference to the very able argument of the learned counsel of the claimant upon the questions at the trial. Indeed I feel under great obligations to the learned counsel on both sides, for the able, careful and instructive arguments they submitted, both upon the facts and law, and particularly for the full references to the authorities bearing upon the questions involved.

Having arrived at the conclusion that the libellant is entitled to recover against the steamboat the damages sustained by the collision, I find it quite perplexing and difficult to determine the true amount thereof, which was submitted to me without a reference to decide.

It is apparent from the evidence that the boat was somewhat decayed, and suffered more on that account than a stanch boat would, and also required more repairs. The libellants raised and repaired the boat themselves, and in repairing changed it in some respects, and it seems to me the charges for the repairs are very large, and I cannot understand why such extensive and general repairs were necessary. A hole about twenty inches wide by ten feet long was broken in her hull and she sank immediately, and while she was lying in the stream some of her upper works were injured by passing boats. She was probably strained some in raising, but I do not feel that the evidence shows satisfactorily that all the repairs and work done upon her were made necessary by the collision. When the owner raises and repairs the boat himself, it is necessary to examine more closely the charges than when done by a third person, for reasons too obvious to require to be stated.

I have concluded therefore, under the testimony offered, that not more than one-half of libellant's charges for repairs should be allowed as properly attributable to the collision, and have

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therefore allowed that account at only \$756. The rule is, that "a party should show positively that they had no more than reinstated the vessel in the condition she was before the collision." This the libellant omitted to do, and I have therefore to exercise my best judgment on that question.

The libellant claimed a *per diem* allowance for the time the boat was undergoing repairs. That seems to have been settled in *Williamson vs. Barrett*, 13 Howard, 101, as a proper item of damages in case of collision. But I hardly think it proper to allow the same compensation as when in use, as the wear and tear when used is something, as well as the ordinary risk of navigation.¹

The court also allowed, for use of steamers or barges to raise the wreck, \$500; for use of steam pump, \$100; for fuel \$100; and miscellaneous charges and expenses to the amount of \$273.50, making a total of \$1,923.50, for which costs he directed a decree to be entered in favor of libellant.—
[Reporter.]

¹ *The Rhode Island*, Abbott's Admiralty Reports, 100.

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JAMES HEAD vs. HARLEY GREEN.

**CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—MAY,
1873.**

BREACH OF GUARANTY—MEASURE OF DAMAGES.

1. The measure of damages for breach of guaranty of the amount due on a note, there being no guaranty of payment or collectability, is what the plaintiff has lost by that breach, which is the value of a judgment if one had been obtained against the makers.

2. Where the makers were solvent but proved payment, the measure is the full amount due on the note at the time of bringing suit, as stated in the guaranty.

This was a motion for a new trial, the case having been tried by the court without a jury, and the issues found for plaintiff.

The suit was brought on a guaranty by the defendant, Harley Green, upon a note for \$500, made by A. King & Co., to plaintiff, dated July 18, 1867, payable on demand, with interest at ten per cent., and on which there was an indorsement of \$100, paid January 30, 1869.

The guaranty is in the following words:

“I hereby guaranty that there is now due and unpaid on the within note, the original sum of five hundred dollars and interest, except the one hundred dollars indorsed. But it is expressly understood that this guaranty is without liability of any kind on the undersigned, except as above, as to amount due. Signed, HARLEY GREEN.”

The defendant being the owner, on December 8, 1870, of this note, together with four others for \$500 each, made by

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Mary E. and A. C. King, and secured by mortgage, sold the whole to the plaintiff for the sum of \$2,150, making at that time the guaranty sued on. The mortgage was collectible, and plaintiffs knew that the makers had nearly completed their arrangements to pay it, and neither party considered the A. King & Co. note of any great value.

After obtaining the guaranteed note, plaintiffs brought suit on it against the makers, A. C. and Alphens King, in Greene county, Iowa, to which the makers pleaded payment in full, to defendant, on the 30th of January, 1869. Defendant was duly notified of this defense, and requested to furnish proof to meet it. He directed plaintiffs to subpoena a son of A. C. King, and Mrs. Mary E. King as witnesses. Both were duly summoned; the son attended and testified that the note was paid; Mrs. King did not attend the trial by reason of sickness. Defendant did not attend the trial, nor furnish his deposition, although he was a competent witness, nor did plaintiff take any steps to obtain his testimony other than by notifying him to furnish testimony to meet the defense. The case was tried and resulted in a verdict against plaintiff, on the ground that the note had been fully paid to defendant before he transferred the same to plaintiff.

The record of the suit and judgment in Iowa, as well as other evidence of payment, was introduced on the trial, and the court found that the note had actually been paid at the time of the guaranty, and that the amount apparently due could have been collected if judgment had been obtained against the makers.

C. H. Lawrence, for plaintiff.

Miller & Frost for defendant, as to measure of damages, cited *Rapelye vs. Anderson*, 4 Hill, 472; *Hutchins vs. M'Cann*, 7 Porter (Ala.), 94; *Braman vs. Hess*, 13 Johnson, 52; *Shaeffer vs. Hodges*, 54 Illinois, 337; *Wright vs. Butler*, 6 Wendell, 284; *Cram vs. Hendricks*, 7 Wendell, 569; *Munn*

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vs. Commission Co., 15 Johnson, 44; *Raplee vs. Morgan*, 2 Scammon, 561; *Hawkinson vs. Olson*, 48 Illinois, 277; *Case vs. Hall*, 24 Wendell, 102; *Burt vs. Dewey*, 31 Barbour, 540; *Morgan vs. Ryerson*, 20 Illinois, 343; *Crabtree vs. Kile*, 21 Illinois, 180; *Caswell vs Coare*, 1 Taunton, 566; *Joslyn vs. Collison*, 26 Illinois, 62; *Judson vs. Goodwin*, 37 Illinois, 286; *Pitts vs. Congdon*, 2 Comstock, 352; *Peine vs. Weber*, 47 Illinois, 41.

BLODGETT, J.—The only question now made is as to what is the true measure of damages.

The well-established rule in actions by indorsees against indorsers or guarantors of negotiable paper is, that the measure of damages is the amount paid by the assignee or indorsee to the guarantor or indorser, with interest. But this rule has been only applied, so far as my examination has gone, to cases where there was either an express or implied guaranty of payment or collectability, and I have been unable to find from any research of my own, nor has the industry of counsel on either side furnished me with any adjudged case, or even the dictum of a court or text writer, as to what is the true measure of damages on the breach of a guaranty like this. On a guaranty of payment or collectability, the holder knows that if he takes the necessary steps to fix the liability of the guarantor, he can recover back at least the amount paid for the note, with interest; but in a guaranty like this, he has no such redress. Here the holder of the guaranty takes all the chances of the collectibility of the demand. There is no liability even by the guarantor in case the maker of the paper proves insolvent, but the holder must lose all he has paid unless he can collect from the maker. And it seems to me that the measure of his damages, in case of a breach of the contract as to the amount due, is what plaintiff has lost by that breach; which in this case should be the whole amount due on the note at the time suit is brought. And it appears to me that one weighty reason why this rule should be applied to a guaranty

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like this, is that the holder of notes or bills who attempts to negotiate them after due, must be presumed to know (and he alone) whether there are any legal or equitable defenses to the paper he purposes to transfer to another. And as he assumes no risk in regard to the collectability of the debt, he should at least be held to make good his express undertaking that the paper represents an honest demand for what purports to be due thereon. Can it be supposed that any person would buy a note with such a guaranty unless he understood that the guarantor was holden to make good the pledge he gives? And here it appears that the judgment would have been worth the full amount, if it had been obtained.

Motion for new trial overruled, and judgment for plaintiff.

THOMAS MALONE vs. WESTERN TRANSPORTA-
TION COMPANY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JUNE,
1873.

MASTER AND SERVANT—NEGLIGENCE.

1. **PLEADING NEGLIGENCE.**—In an action by an employe against a corporation for injuries received in falling through a hatchway, it is not a sufficient allegation that the master and mates were negligent in leaving the hatchway open and not placing proper lights or guards around it.

2. As a corporation can only act through agents, the only proper charge of negligence in such case is that the boat was improperly constructed and that the accident happened by reason of such defective construction while the plaintiff was exercising due care.

3. **DUTY OF SERVANT.**—A person employed on a boat to assist in unloading must be presumed to possess the usual knowledge in regard to the construction of the vessel, and unless the hatch was located in an unusual place he is bound to know its location, and it is as much his duty to see that the hatch is closed or properly protected as it is the duty of the captain or mates.

4. **DUTY OF SHIP OWNER.**—A ship owner who provides a sea-worthy vessel, properly equipped, and commanded by competent officers, has discharged his duty towards the subordinates, and cannot be held liable for mere neglect of the officers.

5. **FELLOW SERVANTS.**—Subordinates must be deemed to have entered upon the service with the understanding that they took their chances of negligence or carelessness on the part of others engaged in the common employment.

This was an action on the case to recover damages for injuries received by plaintiff in falling through a hatchway while in the employ of defendant. The declaration alleges that defendant was on the 14th of August, 1870, owner of the

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propeller Chicago, then lying in Chicago river, in this city; that plaintiff was employed as a laborer on board of said propeller to assist in the discharge of a cargo; that it became and was the duty of the master and mates of said vessel to use due care and diligence for the protection of plaintiff from accident or injury, while so employed; that said propeller was removed from her dock, near State-street bridge, in the night-time, to the dock of the Chicago Dock Company, on the South Branch, when plaintiff, about four o'clock, A. M., on the 15th of August, while it was yet dark, was ordered to remove certain platforms for threshing machines, which stood in the middle gangway on the starboard side of the boat, to the larboard side of the boat for the purpose of making room to get at some freight to be landed on said dock; that there was a hatchway known as the "middle hatch" in said gangway, which was carelessly and negligently by defendant and the master and mates of said boat left open without any guard or signal-lights around the same, and while engaged in removing said platforms as directed by the officers of said boat, and in the exercise of due care and diligence, plaintiff, by reason of said hatchway being left open and unprotected and without proper lights, fell through said hatchway into the hold of the same, and was greatly injured.

Defendant filed a general demurrer.

H. Cummings, for plaintiff, cited the following authorities:

Dixon vs. Ranken, 1 American Railway Cases, 569; *Farwell vs. Boston & Worcester R. R. Co.*, 4 Metcalf, 49; *Galagher vs. Piper*, cited in *Lovegrove vs. L. B. & Co., Railway Co.*, 16 Common Bench (N. S.), 669; *Snow vs. Housatonic R. R.*, 8 Allen, 441; *Curley vs. Harris*, 11 do., 112; *Chamberlain vs. Milwaukee & Miss. R. R.*, 11 Wisconsin, 238, 252; *C. & N. W. R. R. vs. Swett*, 45 Illinois, 197; *Perry vs. Marsh*, 25 Alabama, 659; *Walker vs. Bolling*, 22 do., 294.

Miller & Frost, for defendant, cited the following authorities:

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Farwell vs. Boston & Worcester R. R. Co., 4 Metcalf, 49; *Albro vs. The Agawam Canal Co.*, 6 Cushing, 75; *Illinois Central R. R. Co. vs. Cox*, 21 Illinois, 20; *Honner vs. Illinois Central R. R. Co.*, 15 Illinois, 550; *Chicago & Alton R. R. Co. vs. Keefe*, 47 do., 108; Saunders on Negligence, 128, 144, and cases there cited; *Morgan vs. The Vale of Neath Railway Co.*, 5 Best & Smith, 570; *Gallagher vs. Piper*, cited in *Lovegrove vs. L. B. & Co., Railway Co.*, 16 Common Bench (N. S.), 669; 1 Redfield on Railways, 521.

BLODGETT, J.—The only question is whether there is a sufficient cause of action set out in the declaration. Defendant being a corporations can only act through agents, and as there is no allegation that the boat was improperly constructed and so made dangerous to plaintiff, or that the accident in question happened by reason of such defective construction while plaintiff was exercising due care, I cannot see that the allegations of negligence by defendant directly are of any weight, and the case must be considered as standing solely on the allegations as to the negligence of the master and mates.

The master, mates and crew of the vessel were all employes of defendant, each with different duties, but all engaged in a common employment, which at this particular time was that of unloading this boat. But the plaintiff claims that he was acting in an inferior capacity and under the orders of the officers of the boat.

I am aware that there are adjudged cases making the distinction insisted upon by plaintiff.¹ But the rule is undoubtedly well settled in this state and England, that an employer is not liable to a servant for injuries occasioned by the negli-

¹ *Little Miami R. R. Co. vs. Stevens*, 20 Ohio, 415; *Gillenwater vs. Madison & Indianapolis R. R. Co.*, 5 Indiana, 340; *Chamberlain vs. Mil. & Miss. R. R. Co.*, 11 Wisconsin, 238, 252.

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gence of a fellow servant.¹ I am aware that there is a class of cases in this state holding that a railroad company is liable to an employe for not furnishing safe cars or roadway.²

And the same rule, I think, was adopted in this court in the case of *Daniel vs. C. & R. I. R. R. Co.* by Judges Davis and Drummond. But this case contains no substantive allegation of negligence on the part of defendant itself in not providing a safe boat or one constructed in the usual manner, and, as I said before, no such allegations of negligence are made against defendant as bring the case within the rule in *C. & N. W. R. R. Co., supra, vs. Swett, Administrator*, and the class to which it belongs. The declaration in substance charges that the accident to plaintiff happened by reason of the negligence of the master and mates in leaving the hatch open and not placing proper lights or guards around it.

Plaintiff must be presumed to possess the usual knowledge in regard to the construction of steamboats, and as there is no allegation that this hatch was in an unusual place, he certainly ought to have known that there was a hatch there. His own senses would tell him it was dark, and admonish him to use care. He was passing from one side of the boat to the other, where he should have known, and, I think, must be presumed to have known, there was a hatchway. It was as much his duty to see that the hatch was closed, or properly protected if open, as it was the captain's or mate's. No one, I presume, will claim that it was the duty of the master or mate to close the hatch or hang up a light. They had the general supervision of the boat, and it was their duty to see that each one employed in the work of managing the boat performed the

¹ *Homer vs. Illinois Central R. R. Co.*, 15 Illinois, 550; *Farwell vs. Boston & Worcester R. R. Co.*, 4 Metcalf, 49; *Illinois Central R. R. Co. vs. Cox*, 21 Illinois, 20; *Chicago & Alton R. R. Co. vs. Keefe*, 47 Illinois, 108.

² *Chicago & Northwestern R. R. Co. vs. Swett*, 45 Illinois, 197; *Illinois Central R. R. Co. vs. Jewell*, 46 Illinois 99.

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work allotted to him. This is the utmost of their duty, but if they neglected that duty, and the plaintiff was injured by reason of the negligence of a deck hand who should have closed the hatch, or a porter who should have hung up a light, it is but the negligence of a fellow servant, in and about a common business. There is no charge of incompetency on the part of the officers. And it seems to me the ship-owner cannot be held liable for mere neglect of officers to perform their duty. If he provides a seaworthy ship, properly equipped, and commanded by competent officers, he has discharged his duty toward the subordinates. They must be deemed to have entered upon the service with the understanding that they take the chances of the neglect or carelessness of any or all others who are engaged in the common employment and occupation of loading, unloading or running the boat.

Demurrer sustained.

It is the doctrine of the Illinois Supreme Court that the employer is not responsible to the employe for injuries occasioned by the negligence of his fellow servant engaged in the same line of employment. *Honner vs. Illinois Central R. R. Co.*, 15 Illinois, 553; *Illinois Central R. R. Co. vs. Cox*, 21 do., 20; *Mass vs. Johnson*, 22 do., 633; *Chicago & Alton R. R. Co. vs. Murphy*, 53 do., 336; *Same vs. Keefe*, 47 do., 108.

But it is nevertheless the duty of the employer to provide safe structures and apparatus, competent employes and all appliances necessary to the safety of the employed. *Chicago, Burlington and Quincy R. R. Co. vs. George*, 19 Illinois, 510; *Chicago and Northwestern R. R. Co. vs. Swett, Administrator*, 45 do., 197; *Illinois Central R. R. Co. vs. Jewell, Administrator*, 46 do., 99; *Schooner "Norway" vs. Jensen*, 52 do., 373; *Chicago and Northwestern R. R. Co. vs. Jackson*, 55 do., 492; *Perry vs. Ricketts*, Id., 234; and the recent case of *Chicago & N.W. R. R. Co. vs. Taylor*, 6 Chicago Legal News, 86.

See, however, an employe of a railroad company may recover damages for personal injuries due to the neglect of agents of the company, whose duty it was to keep engines in proper repair, even though the directors and superintendent had no reason to suspect negligence or incompetency on the part of such agents, *Ford vs. Fitchburg R. R. Co.*, 110 Massachusetts. Nor is he barred from recovering for injuries sustained by a boiler explosion, by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due to such violation; nor by a rule of the company providing that he must be responsible for the condition of his engine. Id.—[Reporter.

Perkins *vs.* City of Watertown.

HENRY PERKINS *vs.* CITY OF WATERTOWN.CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—JUNE,
1873.

SERVICE OF PROCESS.

1. **MUST CONFORM TO STATE RULE.**—Since the act of Congress of June 1st, 1872, the process of the federal courts must be served in the manner prescribed by the state law, and this court has no power to prescribe or substitute any other mode.

2. Though by the original charter of the city, under which the bonds in suit were issued, service might be made on the mayor or clerk, the legislature has the power to alter the charter in that respect. It is no part of the contract.

3. **SERVICE UPON THE MAYOR ELECT**—before acceptance or qualification, is not a service upon the mayor of the city. The fact that there was no mayor or acting mayor upon whom service could be made, does not augment the power of the court.

This was a motion on behalf of the city to dismiss five suits pending, brought on bonds of the city, on the ground of insufficiency of service.

Wm. F. Vilas & David S. Ordway, for plaintiff.

Harlow Pease, for defendant.

HOPKINS, J.—In one of the above entitled cases, the summons was served by delivering a copy to the mayor elect before he had accepted or qualified.

In the other cases the summons was served on the city clerk and city treasurer, the marshal returning that there was neither mayor nor acting mayor upon whom he could serve the same.

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The defendants now move to set aside the service as insufficient, and appear specially for such purpose only.

The charter of the city authorizes suits to be commenced against it by the service of process upon the mayor, and the question now presented is, whether it can be served upon any other officer or party, so as to give this court jurisdiction.

Rule 30 of this court (common law) is as follows: "In suits against corporations the process may be served in the mode prescribed by the laws of the state. But a judge of the court, in peculiar cases, on motion may prescribe any other mode of service he may deem right and proper." This rule was adopted in 1870. Under it authority is given (in peculiar cases) to a judge of the court to prescribe other modes of service, but in all ordinary cases he adopts the mode of service prescribed by the state statutes.

My associate expressed some doubt as to the power of the court to make such a rule originally, but that question not being necessarily before the court, no decision of it was reached. In these cases no order had been made changing the mode of service from that prescribed by the state statute; but it was claimed by the plaintiff that if an order could have been made authorizing service to have been had on the parties in fact served, the court could now ratify such service; and in that view the power of a judge to grant an order changing the statutory mode of service, since the passage of the act of Congress of June 1, 1872, becomes material. It is claimed that it abrogates that part of the rule authorizing any other mode of service than is prescribed by the state statutes,

The 5th section of the act above mentioned adopts the "practice, pleading and forms and modes of proceeding," as near as need be of the state courts in common law cases, and abrogates all rules of the circuit or district courts to the contrary. This court, by the rule itself above quoted, adopted the state mode of service, so that it cannot now consistently hold it to be impracticable to conform to that mode, and if it is practicable, by the act above quoted it is exclusive. The

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state practice or mode is the rule now on the subject, and this court has no more power to authorize any other mode than the state courts have. State laws, when adopted by Congress, become obligatory upon the federal courts. There can be no doubt but the service of process is a "mode of proceeding." Similar phraseology in the act of 1792, 1 U. S. Statutes at Large, 275, was construed in *Wayman vs. Southard*, 10 Wheaton, 1 (6 Curtis, 319), to include the service of process. The court there say: "It may, then, and ought to be understood as prescribing the conduct of the officer in the execution of process, that being a part of 'the proceedings' in the suit." This would seem to settle the question that the service of process is within the meaning of the act of June 1st, 1872, and being so, the mode of service prescribed by the state law must be followed, and the power of this court to prescribe or substitute any other mode is necessarily abrogated.

Foreign creditors are placed by that act on equal terms with domestic creditors, and we do not see any reason why the federal courts should be appealed to, or grant any special advantages in their favor. The corporation is created by the state legislature, its powers and rights emanate from that source, and if there are defects in the organic law, it is for the legislature and not the courts to correct them.

It was argued that by the original charter service of process might be made on the mayor or clerk, and that the legislature could not alter the charter in that respect, after the issue of these bonds. That point we do not think well taken. It was not a part of the contract in any sense, and the legislature could prescribe a different mode without impairing the obligation of the contract.

The service on the mayor elect before acceptance or qualification, was not a service on the mayor of the city. We therefore think the service in each case was insufficient to give this court jurisdiction of the defendant.

It was stated and shown by the papers that there was no mayor or acting mayor upon whom service could be made under

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the state law; but that does not augment the power of this court, nor confer upon it legislative authority. Courts must administer the law as they find it, not supply defects in legislation when a difficult or hard case presents itself.

Such considerations are to be addressed to the law-making power, not to the courts. But as the service in these several cases is wholly insufficient to give jurisdiction, these motions are unnecessary, and defendant is not entitled to any relief, as it is not injured thereby. The plaintiff may withdraw from the files the summons in each case, and re-deliver them to the marshal for service according to law, if he wishes to do so. And an order to that effect may be entered.

Since the act of June 1, 1872, the practice in the U. S. Circuit and District Courts must conform, as nearly as possible, to the state practice, and the regularity of proceedings should be decided by the decisions of the state courts. *Republic Insurance Co. vs. Williams*, Volume 3 of this Series, 870.—[Reporter.

Grover & Baker Sewing Machine Co. vs. Clinton.

GROVER & BAKER SEWING MACHINE COM-
PANY vs. A. T. CLINTON, ET AL.

CIRCUIT COURT.—WESTERN DISTRICT WISCONSIN.—JUNE, 1873.

IN BANKRUPTCY.

1. FIDUCIARY DEBT—COLLECTION BY AGENT.—Money collected by an agent under an agreement to account and pay over the proceeds monthly to his principal, is not a debt created in a "fiduciary character" within the meaning of the bankrupt act.

2. A bankrupt is not liable to arrest on such a debt, and it is discharged in bankruptcy.

3. ACT OF 1841.—The words "fiduciary character," in the act of 1867, are essentially the same as "any other fiduciary character," in the act of 1841.

4. Decisions under the bankrupt act of 1841, considered and approved. *In re Kimball*, disapproved.

5. MINGLING FUNDS—CONVERSION.—*It seems*, that when an agent is to account monthly with his principal, a court might infer that the agent was allowed to mingle the money collected with his other funds, and to consider himself an absolute debtor for that amount, and if authority so to do may be implied from the course of dealing, the agent would be exempted from special liability for a conversion of the money.

This was an action of assumpsit, by the Grover & Baker Sewing Machine Company, against A. T. Clinton, R. C. Douglass and E. D. Loomis, their agents in La Crosse, to recover a balance of one thousand six hundred and thirty dollars and seventy-one cents.

Since the 1st of April, 1872, defendants, who were merchants at La Crosse, had been the plaintiff's agents in the sale of sewing machines, receiving a commission of thirty-five per cent. of the retail price, and accounting and paying over the balance of sales monthly.

The defendants, prior to the commencement of this suit,

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had been adjudicated bankrupts in the district court; but the plaintiffs, assuming that they were liable to arrest under the state statute, procured an order for their arrest from the circuit court in this cause, in accordance with the state practice, by virtue of which they were arrested and held to bail.

This was a motion by the defendants to be discharged from arrest on the ground that, under the bankrupt act, they were exempt from arrest under the cause of action set forth in the complaint.

Carpenter & Murphey, for plaintiff, cited *In re Seymour*, 1 Benedict, 348; *In re Kimball*, 2 do., 554; same case on review, 6 Blatchford, 292. The transaction is, under the statute of Wisconsin, a crime for which the defendants are liable to indictment as for larceny. Revised Statutes, Chap. 165. (§ 30 Taylor's Ed.), and it cannot be said that a transaction, thus declared to be crime, is a mere matter of contract between the parties.

S. U. Pinney, Wing & Prentiss, and Cameron & Losey, for defendants.

HOPKINS, J.—It seemed to be taken for granted, on the argument, that the state statute authorized an arrest upon such a state of facts.¹

That question may not be quite as clear as claimed.

The state statute, however, is very much broader than the bankrupt act, and allows arrests in all actions of tort, and for money received and misapplied by an agent, factor or broker.

In assuming the liability of the defendants to arrest under the state laws, it is doubtful whether due importance was given to the fact, which appears undisputed in this case, that the proceeds were only to be paid over monthly.

Such a course of dealing might authorize a court to infer

¹ Taylor's Statutes, 1452.

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that the agent was allowed to mingle the money collected with his other funds, and to consider himself a debtor for the amount; and if an authority to do so might be fairly implied, the agent would not be liable for wrongfully converting the money, within the meaning even of the state statute.

It is, undoubtedly, the duty of an agent to keep the money collected for his principal, to whom it belongs; and, if in the absence of an authority, express or implied, to treat it as his own, and himself as a mere debtor, he wrongfully uses it for his own benefit and in his own business, he is liable to an action of trover and to the legal consequences of such an action.¹

Whether the court ought not, in a case like this, to presume a consent or acquiescence of the principal to such use of the funds by the agent, as to exempt him from the more rigorous remedies in actions for torts, we do not decide, but prefer to place our decision upon the ground upon which the case was argued, that is, the right to arrest in such a case under the bankrupt act, during the pendency of the bankrupt proceedings.

The twenty-sixth section of the bankrupt act exempts the bankrupt from arrest, during the pendency of the proceedings, upon all debts or claims from which his discharge would release him.

Section thirty-three declares "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged."

The question depends upon the meaning of the phrase "fiduciary character." It does not mean, certainly, demands arising out of torts, such as trespass or trover, for section nineteen allows demands "for goods or chattels wrongfully taken, converted or withheld," to be proven, and such demands are re-

¹ Cotton vs. Sharpstein, 14 Wisconsin, 226.

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leased by the discharge, so that something more and different was meant than a debt or demand originating in a tort.

A demand for a wrongful conversion of money ought not, it would seem, upon principle, to render a party liable to arrest any more than a wrongful conversion of goods and chattels.

But it is unnecessary to consider the question abstractly, for the same phrase substantially was used in the act of 1841, and the Supreme Court of the United States in *Chapman vs. Forsyth*, 2 Howard, 202, construed it as not including cases of this character, but as having reference to special or technical trusts, as distinguished from such as the law implies from the contract of the parties.

And the court there very properly observe that if construed to include cases of implied trust, but few debts would remain upon which the bankrupt act would operate.

In concluding the opinion, they say that "a factor who owes his principal money, received on the sale of his goods, is not a fiduciary debtor within the meaning of the act." And if a "factor" is not a "fiduciary debtor," he cannot be said to have acted in a "fiduciary character" in relation to the matter out of which the debt arose; and if that is true of factors, it must be equally so of other agents clothed with similar powers; they cannot be regarded either as fiduciary debtors, or held liable in that character, or be denied the benefit of the discharge under the act.

These defendants were, by the express terms of their agreement and their course of dealing, authorized to carry the money received into account, and were to report sales and pay over balance only monthly.

It is true, in the case above cited, some stress is laid upon the association of the words with an enumeration of certain well-defined trusts, as having some bearing upon the interpretation; but such association does not seem to have been regarded as controlling.

Is there any substantial difference between the act of 1841

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and the present act? We think not. In our opinion the phrase "or any other fiduciary capacity," in that act, is as comprehensive as the words "or while acting in any fiduciary character," used in the act of 1867. We are unable to discover any material difference between them. The omission of the words, "executor, administrator, guardian or trustee," does not necessarily change the meaning of the phrase "fiduciary character" or capacity. And as that language had been construed by the Supreme Court as not to include cases of this kind, when the present act was passed we think Congress must be presumed to have accepted that construction and to have used the phrase in the sense given to it by the decision of the court above-mentioned. Such is the universal rule for interpreting re-enacted statutes.

The Supreme Court of Massachusetts, in *Cronin vs. Cotting*, 104 Massachusetts, 245, in a well-considered opinion, have held that the act of 1867 meant the same, and should receive the same construction as that given to the act of 1841, in *Chapman vs. Forsyth*, *supra*, that the slight change in the phraseology did not warrant a different construction.

To give to the act the comprehensive meaning contended for by the plaintiff's counsel, would be to except from its operation a very large and important branch of commercial transactions, and give to manufacturers and others who adopt the mode of selling their manufactured articles through agents, as was done in this case, and to the owners of property (almost necessarily) consigned to commission men and factors for sale, a very great and decided advantage over merchants and others engaged in the ordinary modes of conducting commercial pursuits, and open the door for all kinds of shifts and devices, on the part of merchants as well as manufacturers, to evade the operation of the bankrupt law, alike discreditable to the parties, and detrimental to the interests of trade and commerce.

We are aware that the District Court of the Southern District of New York, *In re Kimball*, 2 Bankrupt Register, 74,

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has given a different construction to the section of the bankrupt act now under consideration, and held that a commission merchant, who received property from a country dealer to sell and remit the proceeds, after deducting his commission for selling, was liable to arrest in an action for not paying the proceeds, and that such decision was affirmed by the circuit court, 2 Bankruptcy Register, 114, Justice Nelson giving the opinion.

But the reasons assigned by those learned judges fail to satisfy us of the correctness of their conclusions.

We cannot see the difference between the present act and the act of 1841, which they refer to, and upon which they base their opinions and reject the decision of *Chapman vs. Forsyth*, above-mentioned.

We do not believe that Congress intended, by the slight and insignificant change in the phraseology in the present act, to alter the defined meaning and judicial construction given to the act of 1841, and hence regard the decision under that act as binding upon the courts in construing the present act.

We think, therefore, and for the reasons above stated, that the defendant's motion should be granted, and direct that they be discharged from arrest, and that the order therefor be vacated and set aside.

DAVIS, J., concurred in the above opinion.

For a general discussion of the position of a factor under this 33d section, consult the essay in 7 American Law Review, 32. "Are our factors merchants or trustees?"—[Reporter.

Whitney vs. The Janesville Gazette.

WILLIAM H. WHITNEY vs. THE JANESVILLE
GAZETTE.

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—JUNE,
1873.

LIBEL.

1. Printed slander is a higher offense than merely speaking the defamatory words.

2. LIBEL DEFINED.—A publication without justification or lawful excuse, and calculated to injure the reputation of another, and expose him to hatred or contempt, is a libel.

3. The words are to be taken in their ordinary sense, and if directly calculated to degrade a man in the estimation of his acquaintances, and to injure his business character, they are actionable *per se*, without proof of malice or special damages.

4. An account of an assault and battery, if correctly given as an item of local news, cannot be complained of. But though the plaintiff may have been the aggressor, and have violated the law, this did not authorize the writer to go outside of the transaction, and reflect upon the plaintiff's personal and business character, unless the strictures were true.

5. MALICE.—If the charge is false, malice need not be proved, it will be implied. Good motives will be implied from the truth of the charge.

6. JUSTIFICATION.—The truth of the publication is the only perfect answer and bar, and the justification, to be complete, must be co-extensive with the libel.

7. MITIGATING CIRCUMSTANCES.—If offered in evidence, to repel the presumption of malice, it must be shown that the defendant knew of them at the time of making the charge.

8. PLAINTIFF'S BAD CHARACTER.—Defendant may show that plaintiff's reputation sustained no injury, because he had none to lose.

9. He is presumed to be of good character until the contrary is shown, and the burden of proof is on the defendant. It is his general reputation, and not his reputation as to any particular transaction, which is in issue.

This was an action of libel by William H. Whitney against the *Janesville Gazette*. The alleged libelous publication consisted of an article about three-fourths of a column in length,

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published in the issue of January 24, 1871, and headed "A Desperate Assault on a Peaceable Citizen." It gave an account of an assault by the plaintiff upon one Tompkins, a jeweler in Janesville, in his store. The plaintiff entered by breaking the glass in the window. The affair took place in one of the most prominent streets in Janesville, and created considerable excitement at the time. The plaintiff laid his damages at \$10,000. The portions of the publication alleged to be libelous are stated in the charge to the jury.

I. C. Sloan and H. S. Orton, for plaintiff.

Charles G. Williams and J. B. Cassoday, for defendant.

DAVIS, J., charged the jury as follows:

GENTLEMEN OF THE JURY: This case has been tried with eminent ability, and it becomes the duty of the court before you pass upon it, to aid you, within legal rules, in reaching a proper conclusion. This action is for printed slander, which has always been regarded as a much higher offense than where the defamatory words were merely spoken. In written, or printed slander, the act is more deliberate than barely speaking the words, and the injury resulting from the publication more serious and mischievous. On this account, written or printed slander is punishable by indictment, as well as by civil action, which is not the case with oral slander.

A publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred or contempt, is a libel.

The effect of the words used is the test of whether they are actionable or not, for the injury caused by the slander depends on the meaning which any reasonable man would give to the words on reading them. The ordinary sense of those words is to be taken as the meaning of the party who employs them. And if the import of the words, as they may be fairly understood by those who read them, is directly calcu-

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lated to degrade the man in the estimation of his acquaintances, and to injure his business character, they are in themselves actionable, and do not require proof of malice, or that any special damage has resulted from their publication, for every one is presumed to intend the natural and necessary consequences of his own conduct. To say of a person that he is a professional swindler, is actionable, because every one would understand that the accusation was that he made a practice of defrauding others by imposition or artifice.

And to accuse a man of bringing another to financial ruin, by his machinations, is libelous. Such a charge necessarily conveys the idea that the accused party, by contrivance, brought about this result, and is a serious damage to his reputation.

Whether the particular publication which is the subject of this inquiry is within the rules which we have laid down for your guidance, and therefore libelous, is a question upon which you are to exercise your judgment, and pronounce your opinion as a question of fact. The whole article is to be taken together in determining the character of it. It sets out with an account of a serious affray, in which the plaintiff and one Tompkins were concerned, and which produced great excitement in the community of Janesville. The writer then says that this man Whitney (the plaintiff in this action) has figured rather conspicuously for some time past, to the disadvantage of the business interests of Janesville, and then proceeds to give an account of Whitney's dealings with S. C. Spaulding, Mr. Dennell, W. L. Gookins and Tompkins, upon whom the assault was made, and after stating that Tompkins, while Whitney was absent, locked the store door, to prevent Whitney from packing up the goods until some sort of a settlement was effected, says: "This was the occasion of the assault which produced great excitement for a time, as the sympathies of the public are with the victims of this professional swindler." The article winds up as follows: "Mr. Whitney is a resident of New York city, and has his headquarters on

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Broadway. We understand that his ways are not as light as are as those of good and honest men."

The account given by the writer of the occasion and circumstances attending this assault and battery are not complained of, and the evidence relating thereto offered by the defendant was excluded by the court, as not pertinent to the issue. This account, as an item of local news, if correctly given, could not be complained of.

It may be that Whitney may have been the aggressor in this assault, and may have violated the law, and behaved badly; but this did not authorize the writer to go outside of this transaction and compose an article reflecting injuriously upon Whitney's personal and business character unless the strictures were true. It is for the statements contained in this portion of the article that the plaintiff sues. Taking the whole article together, what does it mean, and what would men of ordinary intelligence understand by it? It is for the jury to say. Do the words used convey the meaning that Whitney was guilty of dishonest practices in his business dealings with the several persons mentioned? If so, unless they are true, the plaintiff has suffered, and is entitled to compensation for publication. It is true, there is no action for the words of mere general abuse, but do not these words import that Whitney dealt dishonestly with the persons named? Could the writer have meant to charge anything less than this, when he winds up his account of Whitney's transactions in Janesville, by stating that the sympathies of the public were with the victims of this professional swindler, and could the reader of the article have understood it in any other way?

Whether the reader of this article would understand the writer as intending to charge Whitney with swindling everybody with whom he had dealings, or only those persons who are named in the article, may admit of some question. It is for the jury to say whether this charge was meant and would be understood as being restricted to Whitney's dealings with

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Spaulding, Denell, Gookins and Tompkins. And it is for the jury to say whether or not the injury to Whitney is greater or less, according to the enlarged or restricted sense of these words, as they may find them to have been used. In connection with this point the closing part of the article is to be considered by the jury.

It winds up, as we have seen, by stating the residence of the plaintiff, and that the writer understood "that his ways are not as light as those of good and honest men." Were these words meant, and would they be understood as applying to the Janesville transactions, or to the general character of the plaintiff? If the latter, then the jury are to say whether or not they convey a general charge of dishonesty, and are calculated still further to bring Whitney into disgrace and disrepute.

Does the whole publication hold the plaintiff up to reproach or disgrace in his business relations, either with specific persons or the public generally? If so, it is a libel. As we have stated, malice need not be proved; it will be implied if the charge is false. As malice is inferred from the falsity of the charge, so good motives will be implied from the truth of the charge. And this leads us to consider the defenses to this action. There can be but one perfect answer and bar to it, and that is that the publication is true. And the justification to be complete must be co-extensive with the slander. It is apparent from the evidence that the charge of general swindling and dishonest practices has not been sustained. Has it been sustained, if the jury believe the publication was meant and would be understood as limiting the charge to the dealings with the persons named in Janesville?

On this point there can be no doubt, for there is not a particle of evidence, to show that Whitney ever dealt unfairly with Spaulding or Denell, or had anything to do with the pecuniary embarrassments of either. Nor is there any evidence that he swindled Tompkins or dealt dishonestly with him. The most that can be said in regard to the evidence on this

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subject is, that there was a misunderstanding in relation to the time allowed to Tompkins, within which to determine whether or not he would buy the goods. There was no moral turpitude involved in the transaction. The defendants, then, having failed to show any improper dealings with Spaulding, Denell and Tompkins, were not justified in the charge which they made in relation to those dealings. The justification to be complete, must extend to every part of the defamatory matter, which could by itself form a substantive ground of action.

But by the law of this state, the defendants may prove, in mitigation of damages, such facts as tend to prove the truth of the charge and yet fall short of it. And it is in this view that the jury will consider the evidence relating to the dealings of Whitney with Gookins. It is not the purpose of the court, in view of extended remarks by counsel on both sides, to comment on this evidence and explain it. It is one of the main features of the case, and presents a question of fact, on which the jury are peculiarly qualified to pass. If, on fairly considering the whole evidence bearing on this point, you are of opinion that there is nothing to impeach the fair dealing of Whitney with Gookins, then the libel in this particular is also false, and the offense of the publication of it is in no respect mitigated.

On the contrary, if the jury believe, from the evidence, that Whitney was guilty of dishonest practices in his dealings with Gookins, and tried to cheat him, this will be weighed and considered by them in mitigation of damages. The evidence on the subject consists mainly of the testimony of the parties themselves. The jury should weigh all the facts and circumstances detailed by the parties, and say where the truth of the matter is. Mitigating circumstances are offered in evidence to repel the presumption of malice. Where this is the case it should be shown that the defendants knew of them at the time they made the charge. On this point, the jury will recollect the testimony given by the wri-

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ter of the article and by Gookins, and reconcile it, if they can.

If they are not able to do this, then to say what is the truth about it.

The plaintiff's general character is in issue in this action, and the defendants may show that the plaintiff's reputation has sustained no injury, because he had no reputation to lose.

This they have endeavored to do by the deposition of two witnesses from New York, and this proof has been met by the deposition of four witnesses from there and by the oral testimony of one witness from this city.

We do not care to comment on this testimony, for the jury will recollect it. It is for you to say whether the attack made on the general character of the plaintiff has or has not been sustained. He is presumed to be of good character until the contrary is shown, and the burden of proof on this point is on the defendants. It is the plaintiff's general reputation taken as a whole, and not his reputation as to any particular act, or in any particular transaction, that is the subject of injury in determining this point.

The jury will take the case and do justice between the parties.

Hopkins, J., concurring.

The jury found a verdict for the plaintiff for eleven hundred dollars.

A publication calculated to make the party infamous, odious, or ridiculous, is *prima facie* a libel, and implies malice. *White vs. Nicholls*, 8 Howard, 266; *Dexter vs. Spear*, 4 Mason, 115; *Commonwealth vs. Calp*, 4 Massachusetts, 163; *Guthrie vs. Miall*, 15 Meeson & Welsby, 319, 344; *O'Brien vs. Clement*, Id., 435.

Rules of construction applicable to a libelous publication. *Kerr vs. Force*, 3 Cranch C. C., 8.

"Libel," defined. *Hillhouse vs. Dunning*, 6 Connecticut, 391, 407; *Steele vs. Southwick*, 9 Johnson, 214; *The State vs. Farley*, 4 McCord, 317; *Clark vs. Binney*, 2 Pickering, 113; *Cooper vs. Greeley*, 1 Denio, 347; *Newbraugh vs. Curry*, Wright (O. Sup. Ct. Rep.), 47.

The whole publication, in connection with the circumstances, should be construed together. *Graves vs. Waller*, 19 Connecticut, 90, 94.

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A malicious publication is held to be actionable, when speaking the same words would not be. *Thorley vs. Lord Kerry*, 4 Taunton 355; *McClurg vs. Ross*, 5 Binney, 218; *Fonville vs. M'Neuse*, Dudley (S. C.), 303.

Though an editor has the right to publish the fact that a person has been arrested, and upon what charge, he has no right to presume that he is guilty. *Usher vs. Severance*, 2 Appleton, 9.

Aspersions upon an author's moral character, printed in a criticism on his books, are libelous. *Cooper vs. Stone*, 24 Wendell, 434.

If the defendant intends to rely on the truth of the publication, either in bar or mitigation of damages, he must plead it specially, *Barrows vs. Carpenter*, 1 Clifford, 204; *Stow vs. Converse*, 4 Connecticut, 17, 33; *Mix vs. Woodward*, 12 do., 262, 289; *Torrey vs. Field*, 10 Vermont, 353; *Shirley vs. Keathy*, 4 Coldwell (Tenn.), 29; *Hagen vs. Hendry*, 18 Maryland, 177.

In mitigation, the defendant may show the general bad character of plaintiff, and any fact which tends to disprove malice. *Sheahan vs. Collins*, 20 Illinois, 325; *Maynard vs. Beardsley*, 7 Wendell, 560; *Young vs. Bennett*, 4 Scammon, 43; *B. vs. I.* 23 Wisconsin, 372.

The defendant's justification must be as broad as the charge. *Skinner vs. Powers*, 1 Wendell, 451; *Brooks vs. Bemis*, 8 Johnson, 455; *Stillwell vs. Barter*, 19 Wendell, 437.

The truth of the libel, when it does not negative the intention to defame the reputation of the plaintiff, cannot be shown in defense, but it may be shown that the purpose was justifiable. *Commonwealth vs. Chap*, 4 Massachusetts, 163; *Commonwealth vs. Blanding*, 3 Pickering, 304; and in *Swift vs. Dickerman*, 31 Connecticut, 285, it is held, that the truth in an action of slander cannot be shown in mitigation of damages.

If a plea of justification is made in good faith, evidence insufficient to prove it should be considered in mitigation. *Thomas vs. Dunaway*, 30 Illinois, 373. But if introduced for the purpose of further injuring plaintiff, they are an aggravation. *Id.* But mere failure to prove justification does not entitle the plaintiff to exemplary damages. *Raynor vs. Kinney*, 14 Ohio State, 233.

Where mitigating circumstances are offered in evidence to repel the presumption of malice, it should be shown that the defendant knew of them at the time he made the charge. *Swift vs. Dickerman*, 31 Connecticut, 285.

It is a general rule in actions of a criminal or quasi criminal nature, that evidence of general good character cannot be introduced, unless the opposite party has offered evidence attacking the character. *Brney vs. Kibbe*, 31 Barbour, 273; *Shattuck vs. Myers*, 13 Indiana, 46; *Reed vs. Williams*, 5 Sneed, 580.—[Reporter.

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LEIGH vs. HOLT.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—JULY
TERM, 1873.

OBSTRUCTIONS IN NAVIGABLE RIVERS.

1. The Oconto river is, in contemplation of law, a navigable stream.
2. RIGHT TO CONSTRUCT PIERS OR BOOMS.—Individual property owners upon its banks have, strictly speaking, no right to construct booms or piers in it without authority from the legislature.
3. The status of the owner of such boom or pier is not changed by the fact that they were purchased and not constructed by him.
4. ACQUIESCENCE.—Where the construction of such piers and booms had been acquiesced in by the public, their owners must be considered to have acquiesced in their construction and maintenance by one another. One boom owner cannot bring a suit against another simply for the construction and maintenance of a boom.
5. DUTY OF BOOM-OWNER.—Nevertheless it is the duty of the boom-owner not to interfere with the rights of other persons or their property on the river, and he must use unusual diligence in keeping a passage-way clear.
6. *It seems*, that as to any person not connected with any such obstruction, the construction and maintenance of piers or booms would be illegal, and the owner would be accountable for any damage so sustained.
7. RIGHTS—HOW CONSTRUED.—The rights of the public should be liberally, and those of the boom and pier owners strictly, construed.
8. BOOM-OWNER MAY USE CHANNEL REMAINING.—The owner of a pier or boom does not thereby cease to have the right to use the channel which remains—he still retains that right in common with all others.

Finches, Lynde & Miller, and Mr. Tracy, for plaintiff.

E. A. Storrs, for defendant.

DRUMMOND, J., charged the jury as follows:

This is an action to recover damages sustained by the

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plaintiff in consequence of obstructions to the Oconto river, placed there, as is alleged, by the defendants.

The cause of action as set forth in the declaration is substantially this: that the plaintiff was the owner of a saw-mill on Little River, a tributary of the Oconto river; that he manufactured lumber there, and sent it to market by the river, and also in that way obtained his supplies; that the defendants were the owners of land bordering on the Oconto river, and that they also had a mill upon the river; that along the banks of the river where they owned the land, they had constructed a boom to retain their logs as they might need them for sawing, that there was a large number of logs annually descending the river, of which the defendants owned a considerable portion; that there were piers in the river connected with the boom; and that there was a jam of logs there more or less frequently, which was sometimes continued for many weeks, and which prevented the plaintiff from sending his lumber to market; and he alleges that in consequence of these booms, piers and jam of logs, he sustained special damage during the years 1857, 1868, 1869 and 1870.

The principal damage is, however, said to have been in the year 1867, when, as he states, rafts of lumber were detained several weeks, and in one or two instances particularly the lumber was prevented from reaching the mouth of the Oconto river so that it could be shipped to Chicago and Milwaukee at a time when it was at a very high price, and that in consequence of the delay caused by the obstructions which the plaintiff met in the transit of his lumber from his mill to the mouth of the Oconto river the price fell and he sustained very serious loss.

It is alleged that the obstruction was at the piers of the defendants, and that after the lumber passed the piers the navigation was substantially open to the mouth of the river, and the question is whether these allegations in the declaration have been sustained by the evidence in the case.

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And first as to the legal status of the Oconto river, upon which these piers and booms of the defendants were maintained.

It is conceded that the Oconto river, although perhaps in one sense not strictly navigable, yet in contemplation of law is to be treated as a navigable river, with all those rights which can be claimed for navigable rivers as connected with the general public. It was a meandered stream, and I think that the court will have to say to you that, strictly speaking, no individual owner of property upon the banks of the river had the right to construct a boom or to place a pier in the river without authority from the legislature. So that we have to assume in the investigation of this case, that although these piers and booms were not placed there by the defendants, but were purchased by them, yet in point of strict law, their maintenance as well as construction was a violation of the rights of the public; but it would be wrong for us to lose sight of the particular circumstances connected with the construction of piers and booms upon this river, and we must not forget either that the plaintiff is himself a mill-owner upon a stream, as I understand, legally in the same condition as the Oconto. There seems to have been a sort of general public acquiescence, if I may so say, judging from the evidence, in the erection and continuance of piers and booms upon this river. In other words, the state, which undoubtedly would have the right to speak, has never yet spoken, and so far as we know, has never instituted any proceedings to put an end to the piers and booms which are maintained upon the river, and it could hardly be said, if this were an action brought by a mill and boom owner on the Oconto river, that he could maintain a suit against a man simply for the construction or maintenance of piers and booms; so that while it may be true that as against the state and the public, the construction and maintenance of piers and booms are illegal, still parties may waive their right to object to the construction and maintenance of both piers and booms; and it is a question

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proper for the jury to consider in this case, whether the plaintiff is in such a condition that he can complain of the construction and maintenance of the piers and booms as such. And we should bear in mind, in considering this part of the case, what probably has caused the silence of the public for so long a time (for you will recollect that these piers and booms have been continued there for a great many years), namely: that there must be some device by which logs cut at the sources of a river shall be detained in their transit down, so that they can be manufactured into lumber and made available; and a great deal, of course, will depend upon the nature and character of the stream down which the logs are floated, and I suppose the true explanation why the state or the common public has never done anything in relation to this matter, is because it has been felt that there should be some arrangement by which the logs could be retained floating upon the river until they are manufactured. So that while we lay down this as the strict rule of the law, we qualify it by calling your attention to the circumstances connected with the construction and maintenance of the piers and booms upon this river; also to the particular facts connected with the position and status of the plaintiff himself as a manufacturer of lumber upon a tributary of the river.

If this were a suit by a person not connected with the booms and mills, and his property was arrested in its transit down the river, I think he would occupy a different position from the owner of a mill or a boom; then he would have the right to call upon the court for an unqualified rule upon the subject, and the court would be compelled to say that, as to him, the construction and maintenance of the piers and booms would be illegal, and for the detention of his property the owner of booms and piers would be held accountable.

With these remarks as to the character of the stream, the silence of the public, and the situation and circumstances of the various parties as to the subject matter of the controversy, we will proceed one step further in the case and determine

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whether or not, if the plaintiff has waived the right to complain of the mere construction and maintenance of the piers and booms, there has been any act of the defendants causing a detention of his property in its transit to market. If it be true that as respects the plaintiff, the defendants could maintain the piers and booms there, still they could only be maintained in such a way as not to interfere with the rights of other persons or their property in its transit up and down the river, and it seems to me that conceding all that, the court has in one aspect of the case, conceded from the silence of the public, and the position of the parties in reference to the piers and booms, that the rights of the public in relation to the passage-way for the property of each citizen should be liberally, and the rights of the owners of the piers and booms strictly, construed. I think that it would be their duty even to be more than ordinarily diligent in keeping clear the passage-way down the river. If their piers and booms are to stay there at all, it should be so that the passage-way should be kept clear. Of course they are not to perform impossibilities. You are to construe their acts with reference to the circumstances surrounding anything which becomes a matter of investigation on your part. For instance, in the removal of logs on their way down the river, the evidence shows that the logs are thrown into the river loose; that they float down with the current. Of course, in being thus thrown in and floating together in great and small quantities, there is a liability, without any force from human hands, to lodge in the river—to jam, as it is termed. Now, under such circumstances, it is the duty of all parties who own piers and booms on the river, to use unusual diligence in clearing a passage-way, so that they may pass on, and in considering the conduct of the defendants upon this point of the case, it will be for you to determine whether they have done all that skill and labor, under the circumstances, could reasonably do in order to keep the passage-way clear.

The defendants would not be liable for the obstruction of

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the river below, nor would they be held responsible if logs could not be put through their piers or divided there because they were obstructed below. When they have done all that they can, so far as they and their property are concerned, they, under the aspect of the case which I am now considering, are relieved from responsibility.

It is claimed, on the part of the plaintiff, that conceding the right of the defendants to maintain piers and booms, as the only object of the defendants was to manufacture their lumber, they had no right to use the channel in common with the public for their own logs down, the river, if they could have floated them into the boom as, thus removing their own logs from the river, there would to that extent be removed an obstruction to the passage of the logs of others. It is almost impossible for the court to lay down any absolute rule upon this branch of the case. It cannot be said, conceding their right to maintain the piers and booms, that the defendants had ceased to have a right to use the channel which remained. They had that right in common with all others; they would not forfeit it by the fact that they had piers and booms upon the river, but no man would have the right to monopolize the river, or prevent a passage of the property of others. In other words, each man should so use the right which he has as not unnecessarily to interfere with the rights of others, and it is a question which the jury may consider without the court giving any absolute rule upon the subject, if the boom of the defendants was more or less open, whether they might not have transferred to their boom logs which might be interfering with the logs or lumber of others in their transit down the river. It is for you to determine whether or not there was any obstruction unnecessarily on the part of the defendants with the property of the plaintiff in going up or down the river, and whether the plaintiff was damaged by such obstruction.

The jury found a verdict for plaintiff.

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As to how far riparian owners may erect wharves and piers, and the limitation by navigability of the stream, consult *Dutton vs. Strong*, 1 Black, 23; *Yates vs. Milwaukee*, 10 Wallace, 497.

The erection of a dam without legislative authority in a river, in fact navigable, is unlawful, whether it interferes with the navigation of the river or not. *Wisconsin River Imp. Co. vs. Lyons*, 30 Wisconsin, 61.

Any erection or obstruction not authorized by competent legislative authority, which materially interferes with the paramount right of navigation, is unlawful. *Northwestern Packet Co. vs. Atlee*, lately decided by Dillon, J., in the United States Circuit Court of Iowa, and reported in 12 American Law Register, N. S., 561.—[Reporter.

**SAMUEL H. TURRILL vs. ILLINOIS CENTRAL R. R.
CO. AND FOUR OTHER COMPANIES.**

**CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY.
1873.**

CAWOOD PATENT CONSTRUED.

1. PRACTICE IN REFERENCE AS TO DAMAGES.—Where a patent has been sustained by the court, the master, on a reference to ascertain and report the amount of damages caused by the infringement, should not go into the general question of infringement, nor consider the general scope and extent of the patent: he should simply examine and decide as to the extent of the infringement as to the particular machine used by the defendants.

2. MASTER SHOULD SIMPLY APPLY THE PRINCIPLES LAID DOWN BY THE COURT.—The principles as to the validity of the patent having been decided by the court, the master's duty is simply to apply them to the machines actually used.

3. It is not his duty to go through the history of the machines offered in evidence, but only to compare them together.

4. Where there has been a constant effort to approach as near as possible to the machine patented, such conduct of the defendants may be considered in deciding the question of infringement.

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5. **THE BAIN PATENT**, for a machine for mending rails, is not an infringement of the Cawood machine.

6. **MEASURE OF DAMAGES—BASIS OF COMPUTATION.**—Where at the time of the use by the defendants of the Cawood machine there was no other method of repairing rails than a common anvil or swage-block, a comparison of these two methods is the proper basis for estimating the damages.

7. It is not competent to show that it was unprofitable to repair rails by the Cawood machine, or that it would have been better to re-roll them, or otherwise dispose of them; it must be presumed that the defendants' interests were promoted by their use of the machine, and they can not be permitted to show that they pursued the wrong policy.

8. The proper basis for estimating the damages caused by the infringement is the cost of repairing the rails on the Cawood machine as compared with the cost by other known methods. The rule in *Mowry vs. Whitney*, 14 Wallace, 620, followed.

9. *It seems*, that the difference in cost of the respective machines is a proper element in estimating the amount of profits arising from their use.

10. **EXCEPTION—MUST SHOW WHEREIN ERROR CONSISTS.**—Where exceptions did not point out wherein the master erred, and the counsel do not direct the attention of the court to the evidence establishing the alleged error, such exceptions will be overruled.

11. **CONSOLIDATED RAILROADS—DAMAGES APPORTIONED.**—Where railroad companies had consolidated and enlarged their charters, the master should ascertain to what extent each company had infringed.

These were five bills in equity against the Illinois Central and four other railroads, brought by Samuel H. Turrill, assignee of Joseph D. Cawood, for an infringement of the patent issued September 9th, 1856, for a new and useful improvement on the common anvil or swage-block for the purpose of welding up and reforming the ends of railroad rails.

The cases were by consent of counsel heard and submitted together.

This patent has already been before the Supreme Court of the United States,¹ and also twice before this court,² and the validity of the patent was sustained.

By the interlocutory decree of July 18th, 1871,³ this court

¹ *Turrill vs. Michigan Southern Railroad Company*, 1 Wallace, 491.

² Vol. 3 of this Series, 66, 72.

³ Vol. 3 of this Series, 72.

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affirmed the validity of the patent, and referred the cases to the master to ascertain and report which, if any, of the machines used by the defendant infringed the patent, and what damages the patentee had sustained by said infringement. The master, on the 7th of November, 1872, reported that all of the seven machines used by defendants, the Illinois Central, the Etheridge, the Whitcomb or Cleveland Block, the Michigan Southern, the Bayonet Vise, the Beebe & Smith, and Bain's Reversible Rolls, infringed the plaintiff's patent within the rules and principles as laid down by the court, and that the only other appliances used by defendants for the purpose of repairing railroad rails was the common anvil or swage-block.

On the coming in of this report, the several defendants filed thirty exceptions to the report; which exceptions are sufficiently stated in the opinion.

B. F. Ayer and Walter Curtis, for plaintiff.

*George Gifford, J. N. Jewett, George Payson, and R. Bid-
dle Roberts, for defendants, who cited Mowry vs. Whitney,*
14 Wallace, 620; *Jones vs. Morehead,* 1 Wallace, 155; *Living-
ston vs. Woodworth,* 15 Howard, 546; *Seymour vs. McCor-
mick,* 16 Howard, 480.

DRUMMOND, J.—The exceptions made to the master's report in these cases are numerous, but they may all be considered under a few general heads.

The first seven exceptions refer to the fact that the master assumed that the patent had already been construed by the court, and that he declined to go into the general state of the art in order to determine whether the defendant's machines infringed the patent, and also refused to consider the general scope and extent of the patent.

These exceptions must all be overruled.

The patent has been construed by the Supreme Court of

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the United States, and by this court. The supreme court had declared the principles which are to govern in comparing the machine of the plaintiff with others alleged to be infringed, and this court, in the case of *Turrill vs. The Illinois Central Railroad*, 3 Bissell, 66, had decided the plaintiff's patent to be valid, and that certain machines used by the defendants violated the plaintiff's patent. In these cases in which the master has made his report, and which are the subject of the exceptions, the court in July, 1871, found that the plaintiff was entitled to the relief he asked against the defendants. That is, that the patent is valid and that the defendants had infringed. It appeared that various expedients had been resorted to by some of the defendants in order to evade the patent.

The court held that the anvil was an essential part of the machine to support the jaws, while they held the rail in the act of reparation, but that the clipping out of or removal of a portion of the anvil immediately beneath the rail, so as to prevent its contact with the anvil, did not of itself destroy the identity of the machine. At the same time it was conceded that if the anvil was so far cut off or removed as to cease to support the rail in receiving the blows of the hammer, an indispensable part of the machine was gone. It was because of the difficulty of ascertaining the extent to which the alterations had been made in all the machines used by the defendants, and because of the imperfect condition of the evidence as to one of the machines, that the court directed the master to report what machines, used by the defendants, infringed. It would have been, therefore, obviously out of place for the master to go into the general state of the art either as to the construction of the patent or the infringement. All that he had to do was to decide as to the extent of the infringement, and as to the particular machines used by the defendants. And we say this without intending to deny the right of the master, in case the evidence before him presented the patent under any other aspect not previously considered by the court, to report the facts for its instructions.

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The eighth and ninth exceptions are that the master refused to receive or consider evidence tending to show that some of the defendants' machines were in principle the same as some in use prior to the invention of the Cawood machine, and that he compared only the defendants' machines with Cawood's in order to determine whether or not they infringed.

We think these two exceptions must be overruled.

The principles upon which the validity of the patent for the Cawood machine was to be ascertained had already been decided by the court. The master had only to apply them to the Cawood and the other machines used by the defendants, a matter conceded to be not free from difficulty, mainly on account of the efforts made by the defendants to evade the patent as they supposed it was or ought to be construed by the court.

As already stated, it is not the duty of the master to go through with the history of the machines offered in evidence, in order to decide whether the defendants' machines infringed the plaintiff's. It was sufficient to compare them together to reach a conclusion on the subject. Any other rule would cause him to go over the ground already examined by the court.

The 10th, 11th, 12th, 13th, 14th and 15th exceptions refer to the machines used by the defendants, and which the master has reported infringed the plaintiff's machines.

These exceptions will be overruled.

In some of the machines it may be admitted it is a question of some nicety, as in the Beebe & Smith, the Bayonet Vise, and the Michigan Southern. It is insisted the master should not have reported these as infringing the Cawood machine, because, among other reasons, of the different construction of the jaws and the want of the anvil support. Stress is placed on a remark of the court in the case of *Turrill vs. The Illinois Central Railroad*, to the effect that when the jaws of a vise are cut to the shape of any instrument to be held, it would suggest the idea at once that they might be changed to the

form of any other instrument or object. But this remark was made with regard to the Cawood machine in its finished state, and treating the jaws as a vise. It was certainly a fact that the common anvil or swage-block had long been used for repairing rails, and in comparing the old machine with the new, the difference in the operation and in the time, expense, and labor, could not be lost sight of. And as connected with this the anvil as a support to the jaws while holding the rail, in receiving the blows of the hammer, was considered essential. Now, it is true, in some of these machines, the jaws are more elongated than in the Cawood machine, and in some the rail, in the act of hammering, does not actually come in contact with the anvil, or what takes the place of the anvil, but in all there is something more than a mere vise, and that seems borrowed from the Cawood machine. And we think in deciding on the question of infringement, the conduct of the defendants in relation to their machines may be considered. There seems to have been a constant effort to approach as near as possible to the plaintiff's machine, and yet not close enough to infringe. And in overruling these exceptions, we think that while it may be true that the same rules should be applicable as in comparing the Cawood machine with other and prior machines, to test the validity of the patent, yet that on the question of infringement the comparison should be made directly between the plaintiff's and the defendants' machines.

The sixteenth exception will be sustained. That is made because the master found the Bain machine infringed the Cawood machine.

We do not agree with the master in this. Cawood's patent does not include any machine by which a rail may be held in the act of reparation, but its own special method. Any other person was at liberty to devise a different method of holding the rail. This we think Bain has done by his machine. There are no jaws like those of the Cawood machine. There is no hammer used. The whole operation is performed by

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placing the rail between four rollers, two vertical, which sustain and press the rail, and two horizontal, one each side, to hold it. It is a rolling process—all the rollers moving as the rail advances or recedes in the act of reparation. The elemental idea of the Bain machine seems to us to be different from that of the plaintiff's machine. All the other machines found by the master to infringe, may be said to be the emanations or suggestions of the Cawood machine. This cannot be affirmed of the Bain machine. It is, as to this, an independent creation.

The 17th, 18th, 19th, 20th, 21st, 22d, 23d, 24th, and 25th exceptions relate to the finding by the master, that the old swage-block and the Cawood machine are the only two instruments by which the rail could be repaired, and that the comparison must be between them, and to the rejection of evidence showing that it was unprofitable to mend rails in the Cawood machine, and that it was better to re-roll them, or dispose of them in some other way.

These exceptions will all be overruled.

We do not understand that up to the time of the invention and construction of the Cawood machine there was any other known method of repairing the rails than the common anvil or swage-block. The master reports that the only appliance previously used by the defendants was the common anvil or swage-block, and his statement is not contradicted. If, then, the rails were repaired on the Cawood machine substantially in the same way, and the same result reached as when repaired on the common anvil, these were the only implements of comparison. As long as the defendants used the Cawood machine, these were the only things that could be compared. It was competent always for the defendants, at any time, to make some other disposition of their damaged rails—to cut off the shattered ends, or to re-roll them, or sell them for old iron. As long as they mended them by the method of the Cawood machine, it must be presumed that it was done because the interests of the defendants were thereby

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promoted, and it cannot be permitted to the defendants to show that they pursued a wrong policy, and that they could have disposed of their rails much more profitably. This would strike at most of the patented devices of the time, they being constantly liable to be superseded by improvements, the progress in art and the teachings of experience. Because it may have been ascertained that the use of rails mended on the common anvil, or on the Cawood machine, is attended with risk, the defendants could hardly be permitted to set off any possible damages they might sustain from breakage.

We think, therefore, the master was correct in comparing the common anvil and the Cawood machine, and the costs of doing the work on them.

And this brings up the objections made to the rule adopted by the master in estimating the profits of the defendants by the use of the plaintiff's machine. We admit that if at the time of their use there appeared to be any other methods of repairing the rails, then the damages of the plaintiff might be the difference between the least expensive of these methods and that of the plaintiff's machine, because that would be the advantage which the defendants derived by using the plaintiff's machine over any other appliance then open to them and by which the rails could be mended equally well.

But as we understand the rule laid down by the Supreme Court in *Mowry vs. Whitney*, 14 Wallace, 620, on the facts found by the master, his rule of profits was correct.

The 26th, 27th, 28th, 29th and 30th exceptions relate to omissions of the master to find the difference in the cost of the machines and their use.

We think that these may be proper elements to enter into the amount of profits in using the different machines; but the exceptions fail to point out wherein the master has erred, and the counsel have not in the argument directed our attention to the evidence which establishes the error of the master in this respect; nor has the evidence been brought before us.

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We therefore do not judicially know the cost of the various machines reported by the master to infringe, nor the expense of using them. We think, in order that these exceptions should be available to the defendants, the evidence showing the error of the master should be specifically pointed out, at least in the argument. That has not been done, and therefore they will be overruled. And we may add that, so far as we can judge from our inspection of the machines, with the exception of the Bain machine, the difference in the cost of the infringing machines, as compared with the Cawood machine, could not be very great.

The exception, which is special on the part of the Chicago and Fort Wayne Railway Company, is, we think, well taken, and must be sustained. In view of the history of this company and the legislation affecting it, the master ought to have found how far and to what extent the old company and the new infringed, and if there was a difference, a discrimination should have been made—the more so as the new company may not be responsible for the debts of its predecessor.

It is objected in the argument that the master has not drawn correct conclusions from the evidence as to the cost of labor and fuel in mending the rail on the anvil and on the Cawood machine. The evidence proving the error of the master has not been pointed out to us, and it would be necessary to examine critically the whole of the testimony in this branch of the case in order to determine—something we could hardly be expected to do on such a general objection as this; but as the case will have to be sent back to the master, he can be directed to re-examine the evidence and correct any conclusions he has made, if he thinks the evidence justifies it.

DAVIS, J., sat on the hearing of the case, and concurred in above opinion.

In cases of infringements of patents in actions at law, the measure of damages is precisely what is lost to the plaintiff, and not what the defendant has earned. *Cowing vs. Rumsey*, 4 Fisher (P. C.), 275.

Under this rule the complainant is entitled to the value of the saving

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made by a defendant through the wrongful use of the patented process. *Tilghman vs. Mitchell*, Id., 599. Consult also *Suffolk Company vs. Hayden*, 3 Wallace, 315, and a thorough collection of cases in Sedgwick on Damages (6th Ed.), 726, and note 4.—[Reporter.]

THE TUG MARGARET.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—JULY
1873.

IN ADMIRALTY.

RELATIVE LIABILITY OF TUG AND TOW.

1. The captain of a tug is bound to know the sailing qualities of a vessel which he had towed into a harbor on several previous occasions.
2. He is also bound to know the condition of the harbor, the effect of the wind and waves, and the necessary course to safely enter the harbor.
3. Though the tow should be properly steered and follow in the wake of the tug, the responsibility as to the mode, manner and speed of entrance, and the course pursued, is with the tug.

This was an appeal from the decree of the District Court, dismissing a libel filed by Charles F. Bliss *et al.*, owners of the brig *Mechanic*, against the tug *Margaret*, to recover damages by reason of the grounding of the brig while entering the harbor of Racine, in tow of the *Margaret*.

The facts fully appear in the opinion:

DRUMMOND, J.—This case has been ably argued, and it must be admitted is not free from difficulty. I have hesitated somewhat in consequence of the decision of the district judge

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dismissing the libel, but the parties are entitled to my best judgment on the facts, and not being able to agree with the district judge on some of the leading facts, and on which the case must turn, I shall reverse the decree.

The facts are, that the brig *Mechanic*, of which the libellants were the owners, in November, 1868, took on a load of lumber at Suamico, for Racine, and not far from noon on the thirtieth day of November, arrived off that harbor, and signaled the tug *Margaret* to come and tow her in. The tug accordingly went out and reached the brig, about a mile and a half from the harbor, the precise distance not being distinctly ascertained. The tug approached the brig on the starboard, or weather quarter, the wind at the time blowing from the north and west. A starboard line was thrown from the brig to the tug, and either then, or shortly afterwards, and before the tug entered the harbor with the tow, there was a port line attached to the tug, and the brig was taken in tow. At this time the brig was northeast of the harbor. The harbor consisted of two piers extending out into the lake in nearly an easterly direction, and about 175 feet apart, the north pier extending 300 feet further east than the south pier. The evidence is not entirely clear as to the precise manner in which the tug approached the harbor. The channel was close to the north pier, and was about 12 feet in depth, and perhaps not exceeding 75 feet in width. On the south side of the entrance, there was a shoal. In rounding to, or approaching the harbor, either at a greater or less distance from the north pier, there being a considerable sea or heavy ground swell driving into the harbor, apparently from the northeast, the brig sagged off to the southward, struck the shoal there, and finally was thrown, by the force of the swell, upon the south pier, and a hole stove in her quarter, and was sunk and very seriously damaged. The question is, whether this was the fault of the tug.

There are several points on which there is a conflict in the evidence. The first is, as to the time and place where the

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port line was attached to the tug. On the part of the libellants it is claimed that, in the first instance, the starboard line was attached and then the brig towed within a hundred feet, more or less, from the north pier, when the tug stopped and another line was called for and attached to the tug, and the lines tautened up, and in that way the tug curved around the north pier with both lines fastened, the brig having thus lost her steerage way, and in consequence of that was thrown over on the shoal.

On the part of the defense, it is claimed that a mile from the north pier, and almost immediately after the starboard line was attached to the tug, and before it was tautened up so as to really commence the operation of towing, the captain of the tug called for another line, and it was immediately attached.

This is the first and one of the principal points of conflict in the evidence. Another is, as to what caused the parting of the lines. On the part of the defense it is claimed that the swell of the lake, the rise and fall of the tug and the brig, not always together, caused such a strain on the lines in entering the harbor that the port line parted, and then the brig sagged over on the shoal, and afterwards the starboard line parted.

The fact is, that the brig did fall off and run aground, and the question is how it was done, judging by the best lights that are before us in the evidence.

I think this fact may be considered as established by the clear weight of the evidence; and it tends greatly to elucidate this case, and to enable us to arrive at a correct conclusion: It is that the port line did not part until the brig was aground. That removes a great deal that was claimed as to the want of strength of the port line. It could hardly be expected that any line would stand the tension of a vessel of such tonnage, and loaded in the manner in which the *Mechanic* was when she was aground, and therefore it would not be surprising if the line should part under such circumstances.

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The brig, then, did not run aground because the port line parted, but the port line parted because the brig ran aground.

Now I think one of two things is true upon this hypothesis, that the tug had stopped or was moving so slow in entering the harbor that the brig lost steerage way in rounding the north pier, or that the tug had not given a proper opportunity, and had not the requisite steam upon her to enable the brig to enter the harbor, by laying the right course for that purpose.

Something was said of the brig not having ported her helm in time, and of her not being so manageable a vessel as some others. I think there is not sufficient evidence of any want of skill or diligence on the part of the brig in that respect. And as to the brig not being so manageable a vessel as others, if that were the fact it was known to the captain of the tug when he took her in tow, as he had taken her in port several times before, and it should have induced extreme caution in entering the harbor.

But perhaps there is no sufficient evidence indicating that the brig was any more unmanageable than vessels ordinarily are under such circumstances, and it seems quite clear to me that, from some cause not attributable to the brig, there was not sufficient steerage way on her, either in rounding the north pier or entering through the piers, to enable her to keep her course, and that the tug was bound to see that she had it.

There is a most extraordinary conflict in the testimony, especially in the first particular, namely, as to the time when the port line was given to the tug. Every witness on board of the brig declares that the starboard line was first given, and then, after a considerable interval, when the brig had been towed some distance, the tug arrested her progress and took in the other line and tautened them both up. On the part of the tug, this is asserted to be untrue. It is difficult to understand why, consistently, with the proper knowledge on the part of these witnesses, there could be such a conflict in the

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evidence upon so important a point; but without deciding where the truth may have been as to this point, I hold, as I have already stated, that owing to some cause, the fault of the tug, either in laying the course, or in turning the pier, the brig had not that control over herself through her helm as to enable her to lay her course so as to "hug" the north pier and go into the harbor by the regular channel. Now, the condition of the harbor, the ground swell, the depth of the water, were all better known to the tug than to the brig. The tug had just left the harbor, and the captain of the brig told the captain of the tug how much the vessel drew at the time, and he therefore had all the data proper to determine what course he should take in towing the brig into the harbor.

Something was said about the protest which was made almost immediately after the accident occurred, not having set forth that the tug was in fault.

The protest does not pretend to state what was the cause of the fact which it alleges, namely, that in entering the harbor, the brig fell off to the southward and struck against the shoal, and therefore it is not a circumstance of any material weight in considering the general testimony in the case.

There is the more difficulty in this case because of the particular liability growing out of the relations between a tug and tow. The master of the brig perhaps misapprehended, to some extent, his relations to the tug. It is true the tow is under the control of the tug. The tug directs the course of the tow and its speed. The tug may be said in one sense to be the agent of the tow, and might be under certain circumstances required to accept an act under instructions from the tow. The theory of the master of the brig was that it was entirely under the control of the tug. While this is so in a general sense, it is not exclusively so. There are certain duties incumbent on those who have the management of the tow. It is the duty of the tow to be steered properly; to follow in the wake of the tug, and to perform all those duties which nautical skill demands in order to properly manage the

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tow. It will not do, in other words, to leave the tow without a suitable man at the helm, and the course of the tow must be directed in the wake of the tug; but, after all, as I have said, the tug controls the speed and the course of the tow, and in entering a harbor, such as that of Racine, the responsibility as to the mode and manner of entrance, the speed with which it is done, and the course to be taken, mainly, if not exclusively, rests with the tug. She should know the natural and necessary effect of the wind and of the waves upon herself and tow, and she should be managed with reference to herself and tow with competent nautical and engineering skill under the circumstances. This demand of the law was not, I think, met by the tug in this case, and, therefore, the court finds the tug was in fault, and liable for the damage sustained by the libellants, and refers the case to a commissioner to ascertain and report the amount of damages, and also to report the value of the tug at the time it was released, on the 2nd day of March.

As to the relative responsibility of tug and tow, consult *The Tug Lewis and Barque Alina*, 6 Chicago Legal News, 304, June 13, 1874; *The Tug Mosher*, Vol. 4 of this Series, 274, and cases there cited.—[Reporter.

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***In re* GREAT WESTERN TELEGRAPH COMPANY.**

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1873.

IN BANKRUPTCY.

1. **PRACTICE ON REVIEW—NEWLY DISCOVERED EVIDENCE.**—The circuit court will not on petition for review hear additional testimony. Its power is simply revisory.

2. It will strike out from a petition for review all portions regarding newly discovered evidence.

3. Where there is newly discovered evidence the district court may in a proper case open the decree and grant a re-hearing, and it *seems* that the circuit court might peremptorily direct the district court so to do.

4. Pending such application for re-hearing, the circuit court will suspend action on the petition for review, and afterwards review the new case as finally decided in the district court.

5. **SETTLEMENT OF PROCEEDINGS.**—If the bankrupt can settle all but a few contested claims the court may, on consent of creditors, dismiss the proceedings on security being given to the non-assenting creditors.

The Great Western Telegraph Company was adjudicated a bankrupt by the district court, on the petition of John C. Hilton, and thereupon a petition for a review of the proceedings in the district court was filed in this court by the company; and pending this petition in the circuit court, an application was made by the petitioners for leave to take testimony in addition to what was before the district court, as affecting the question of the bankruptcy of the telegraph company; and a motion was also made by Hilton, the petitioning creditor in the district court, to strike out such portions of the revisory petition filed in this court, as set forth new evidence discovered by the company since the decree of the district court, and which tended to impeach the validity of

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Hilton's claim upon which the company was adjudged bankrupt.

George C. Campbell, G. S. Paddock and E. A. Small, for petitioner Hilton.

George F. Harding and Jno. I. Bennett, for Telegraph Company.

DRUMMOND, J.—This case raises the question as to the proper practice in this court where there has been evidence recently discovered since the trial in the district court, affecting the question of bankruptcy.

As I stated during the argument, if, after a decree of bankruptcy in the district court, there are facts ascertained which may affect the propriety of the decree, and which in fact show *prima facie* that the decree was improperly rendered, there ought to be some way by which that wrong could be rectified.

The petition in bankruptcy in the district court was founded upon an indebtedness upon some promissory notes which had been reduced to judgment. And the question which is sought to be made now is, as touching the validity of that indebtedness.

It is alleged by the petitioners in this court, that there really was no existing indebtedness to the petitioners in the district court, and, therefore, there was no proper foundation for the commencement of proceedings in that court.

I have come to the conclusion that it would not be proper for this court to hear any additional evidence as affecting the decree in bankruptcy. That is a matter within the jurisdiction of the district court.

It was not the intention of the bankrupt law, I think, to make the circuit court a court of original jurisdiction, or to allow the circuit court to act upon the bankruptcy proceedings as if it had original jurisdiction *de facto*. Its only ob-

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ject was to give the circuit court a supervisory control and superintendence over the proceedings of the district court.

There are two ways in which the object of the petitioners in this court can be accomplished. If it be true, as they allege, that there was no *bona fide* indebtedness, upon which the petition in the district court was founded, they can make an application to the district court, setting forth sufficient facts to justify that court in re-opening the question connected with the decree in bankruptcy, and ask for a re-hearing of the subject matter of that decree.

There can be no doubt that the district court would have the power, upon a proper case, to entertain and grant such an application.

It may be that when a case is pending in the circuit court upon review, as it is termed, under the second section of the bankrupt law, upon a showing of the facts warranting the court in so doing, that the circuit court might direct peremptorily the district court to re-hear the case upon new facts thus presented, and to determine whether or not there should be a decree in bankruptcy rendered against the company.

But it would seem to me as though the better course would be in such a case for an application to be made to the circuit court, asking for a suspension of action upon a petition of review until the case can be heard in its new aspect in the district court.

And when it is thus heard in the district court, and the action of the court is had upon the new case, of course it would be subject to review by the circuit court, and any error of the district court could be corrected by the circuit court.

That is one way in which the object of the petitioners in this court can be attained. Another is this: If, as they allege, the company is entirely solvent, and able to settle all the *bona fide* claims against the company, leaving nothing but the contested claim of Mr. Hilton, who was the petitioner in the district court, then they could make an application to the district court to supersede the proceedings in bankruptcy,

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paying off all these other claims, or settling or adjusting them, and obtaining the consent of creditors to such a course and then giving security to the non-assenting creditor for any claim which it may turn out he has against the company and which he may be able to sustain before a competent tribunal. This was the course which was adopted in Indiana in a case which came before me at the last term of the circuit court.¹

In the case I refer to the court allowed the bankruptcy proceedings to be dismissed on the giving of security for the payment of the claims of the non-assenting creditors, those claims being in controversy.

Now, that may be done here. This claim of Mr. Hilton, it is insisted upon the part of the company, is not a *bona fide* claim; that it cannot be sustained when properly investigated, and when the proof attainable is brought to bear upon it. If the company is prepared to pay the other claims, and is entirely solvent, there can be no objection to this course.

Therefore the motion of the petitioners to allow the testimony to be heard in this court, will be overruled; and the motion of the petitioning creditor in the district court, Mr. Hilton, to strike out a certain portion of the petition, will be sustained. This, of course, is without prejudice to the right of the petitioners in this court to reach the end they desire in one of the ways which has been suggested by the court.

¹ *In re Indianapolis, Cincinnati & La Fayette R. R. Co*, ante p. 287.

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DISTRICT COURT. — NORTHERN DISTRICT OF ILLINOIS. — JULY,
1873.

IN BANKRUPTCY.

1. **BONA FIDE HOLDER.**—A *bona fide* transfer of an interest in a partnership may be made without writings or vouchers.

2. A person may be a *bona fide* holder of a promissory note without having paid for it in cash, if it is a genuine business transaction in which he believed that he was paying with a valid and valuable asset.

3. The fact that he considers the maker of a note "slow" does not show that he is not a *bona fide* holder, especially where it appears that he paid for the note in other securities equally "slow."

4. **LIS PENDENS.**—A note in the hands of a *bona fide* holder is not avoided by the fact that the contract in part payment of which it was issued was fraudulent, and proceedings to annul the contract were pending at the time the note was issued.

5. Though the rule of *lis pendens* would apply to a contract assigned during the pendency of litigation over it, the doctrine cannot be carried so far as to affect commercial paper given by the litigating parties.

6. Where a promissory note is fair upon its face, an indorsee is not bound to inquire into the consideration or circumstances under which it was given.

7. **NOTES OF CORPORATION—USAGE.**—A corporation may be bound by promissory notes issued by its treasurer in accordance with a usage, as well as by express authority.

8. **INCIDENT TO BUSINESS—AUTHORITY OF OFFICERS PRESUMED.**—The power to make commercial paper is incident to a business corporation, and the usual executive officers are presumed to act within the scope of their authority, and every intendment will be made to support the paper given, especially when signed by the financial officer of the company.

This was a motion by the respondent, the Great Western Telegraph Company, to set aside the adjudication of bank-

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ruptcy previously entered against it on the petition of John C. Hilton, a creditor.

The petition was filed on the 8th of February, 1873, and on the 28th of April, the company was adjudicated bankrupt. The company then filed a petition for review by the judge of the Circuit Court on the ground of newly discovered evidence, but the Circuit Court refused to hear this testimony and remitted the case to the District Court. This court then allowed the respondent to introduce this testimony, and this motion was made on the final submission of the proofs.

Hilton's claim against the company consisted of judgments rendered in the Circuit Court of Cook County on three promissory notes given by the company to Selah Reeve, dated June 6th, 1872, for \$6,603.16 each, due respectively in four, five and six months after date, and one note for \$869, dated August 1st, 1872, due in four months from date, all indorsed by Reeve to Hilton. These notes all bear interest at the rate of ten per cent. and were signed by George L. Otis as treasurer of the company.

The respondent claimed that the notes were invalid, having been executed and delivered after the publication of the decision of the Circuit Court of Cook county in the case of J. M. Terwilliger, against the respondent Selah Reeve and David A. Gage, declaring void a certain contract entered into between the company and Reeve, and decreeing an accounting.

The respondent also denied that Hilton was a *bona fide* holder of the notes. The notes which Hilton held were originally transferred by Reeve to David A. Gage, and on the — day of July, 1872, transferred by him to Hilton in exchange for his interest in the firm of Reid, Sherwin & Co., in which both Hilton and Gage were partners, their respective interest therein being about \$20,000. There being a disagreement in the firm, Gage and Hilton both proposed to withdraw, but Hilton, not being able to make a satisfactory settlement with the other partners, assigned his interest in the firm to Gage, who assumed the negotiation in his own

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name for the adjustment of the partnership. Gage finally adjusted his interest in the firm, including the interest of Hilton assigned to him, together with a mortgage which he held upon their property at \$60,000, which was secured by a second mortgage on the firm property for that amount payable in installments of \$5,000 each.

The notes were originally issued to Reeve on a contract with him for building a telegraph line from Chicago to Princeton, and transferred by him to Gage in re-payment of advances to him on carrying out his contract.

BLODGETT, J.—I see nothing in the evidence pertaining to the transfer of the notes from Gage to Hilton tending to show it was not a *bona fide* transaction. Gage in dealing with Reid & Sherwin had claimed to own Hilton's interest in the business, and had included that interest in this long mortgage taken to himself.

As between himself and Hilton, he was bound to pay Hilton what that interest was worth, and proposed to give him these notes of the Telegraph Company for Hilton's interest in the Reid & Sherwin matter, and the railroad bonds.

It is true that both Gage and Hilton state that no writings were executed between them, at the time Hilton assigned his unliquidated interest in the firm to Gage for adjustment; but I cannot deem that a circumstance of sufficient import to say that Hilton really had no interest in the firm. He and Gage were partners, and intimate friends; and I do not think the fact that vouchers were not exchanged, or writings executed, shows that Hilton had no *bona fide* claim against the firm to be adjusted. If he had, in fact, no such interest, it would have been easy to have proven it by the books of the firm of Reid & Sherwin, or by calling parties intimate with its affairs, neither of which was done.

It may be and probably is true that neither of the securities exchanged were deemed first-class. The Reid & Sherwin claim had a long time to run, because the mortgage debt,

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which formed at least one-half of the final balance of \$60,000 struck in the settlement against Reid & Sherwin, would be first satisfied by the \$5,000 installments as they were paid.

This \$60,000 was also a second mortgage on the Reid & Sherwin property, and Hilton testifies that while he supposed the Telegraph Company notes were in all respects valid, yet he anticipated that some part of them might have to be renewed and extended. But the fact that an indorsee considers the maker of a note in doubtful credit, or, as the saying is "slow" does not show that the indorsee is not a *bona fide* holder, especially when it appears that he paid for the paper in other paper perhaps equally "slow." It is sufficient to say that the whole testimony, when taken together, seems to my mind to show that the transaction between Gage and Hilton, by which Hilton became the owner of this paper, was a genuine business operation in which each party at least supposed he was parting with a valid and valuable asset for another equally valid and valuable to himself.

It is, however, urged by the respondent that, notwithstanding Hilton paid value for these notes, yet he took them with knowledge of the equities of the company against the original payee to such an extent that they are chargeable with those equities in his hands.

The evidence to sustain this part of the case consists in the fact that the "Terwilliger Case" was pending in the Supreme Court of Illinois at the time these notes were made; that the substance of the bill in that case had been published in the papers of this city, which Hilton was in the habit of reading, and that the allegations of that bill and subject matter of the suit amounted to a *caveat* to all persons not to deal with Reeve in any matter growing out of his relations to the respondent. But I cannot believe any application of the doctrine of *lis pendens* has gone to the extent claimed in this case.

The Terwilliger bill charged that a certain contract made between Reeve and this company was fraudulent as against the *bona fide* stockholders of the company, and asked for an

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accounting in regard to the money paid and work done under that contract. The case had been heard before the learned and able Circuit Judge of Cook county, upon proofs and arguments, and he had delivered an exhaustive opinion reviewing the evidence, and had dismissed that part of the bill for want of equity, from which Terwilliger had appealed. The opinion of His Honor, Judge Williams, holding that there was no fraud in the contract, had been published in the papers of this city months after the publication of the synopsis of the bill, so that if any weight is to be given to publications in the papers of the substance of the bill, the opinion of the Circuit Judge at least neutralized the allegations of the bill, and as the record stood at the time Hilton became the purchaser of these notes, there was a judicial finding that the contract between Reeve and the respondent was not fraudulent for the causes alleged in Terwilliger's bill.

There was no injunction against this company at that time. It was in possession of long lines of telegraph and engaged in the construction of more. It had full control of its affairs through its officers. The bank where Hilton kept his account had recently discounted the paper of the company, and was then the holder of it, to the extent of several thousand dollars, and I cannot conceive that the doctrine of *lis pendens* should be held to have created a conclusive judicial presumption that this company could not on the 6th day of June, 1872, make a valid note to Selah Reeve or owe him a *bona fide* debt.

The general principles by which a third person is charged with notice under the doctrine of *lis pendens* is that the notice attaches only to the thing—the *res*—which is the subject matter of the suit. Here the subject matter of the suit was partly a contract between two of the parties to the suit, and probably Reeve could not have assigned that contract pending the suit without the assignees taking it subject to the result of that suit. But in regard to promissory notes, fair upon their face, an indorsee is not bound to inquire into the

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consideration of the note or the circumstances out of which it grew. The presumption is that the note was given for value, as well as that the indorsee paid value for it. And it seems to me it would be an abusive stretch of the principle of notice by *lis pendens* to hold that this respondent could not give commercial paper in its business transactions pending that suit.

Incidental to this point, it is also insisted that Otis, the Treasurer, had no authority to give these notes, and that they are therefore void.

It is insisted that, by the by-laws of the company, all deeds and contracts are to be signed by the President, and that it is nowhere made the duty of the Treasurer, nor is he permitted, either expressly or by implication, to sign notes. By the fourth by-law it is provided that an Executive Committee shall be elected, consisting of three members of the Board of Directors, "who shall have, and they are hereby authorized to exercise, all the power of the Board of Directors."

On the 5th of June, 1872, a meeting was held by this Executive Committee, at which the following resolution was adopted, and spread upon the records of this company:

"*Resolved*, That the notes already issued by the Treasurer in the name of the company in part payment of a bill for \$37,019. 25, from the contractor, are approved, and that the Treasurer is hereby authorized and directed to settle by note for any balance remaining due on said bill."

It was conclusively shown on the former trial that these notes were given for part of the bill referred to in this resolution, and also that Otis, the Treasurer, had been in the habit of giving notes of this character for upwards of two years last prior thereto.

The power of this Executive Committee was plenary to the extent of the powers of the Board of Directors. The Executive Committee had sanctioned these notes, and directed them to be given, notwithstanding the by-laws provided that the President should sign the deeds and contracts of the com-

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pany. I have no doubt that the Board of Directors or the Executive Committee may also authorize any other person as the agent of the company to sign contracts. Here Otis signed these notes in pursuance of a usage which would raise the presumption that he had authority to do so, and also by virtue of express authority. I do not think it lies in the mouth of the company to question his authority.

The distinction between the acts of an officer of a government or municipal body and the acts of an officer of a corporation created for business purposes, is obvious. In the case of a government official, the signature or indorsement of notes or bills of exchange is exceptional and outside the usual functions of such officer. In the case of a business corporation like this, the power to make commercial paper like this is a necessary incident to the business which the corporation is created to transact, and the usual executive officers of the company are presumed to act within the scope of their authority, and every intendment should be made to support the paper given, especially when given by the financial officer of the company. But suppose, for the purpose of the argument, that it was the duty of Hilton, under the circumstances, to have made inquiry into the consideration of this paper and the power of the Treasurer of the corporation to execute it, the evidence shows that the actual consideration of the notes was money which Gage advanced to pay for material and labor which actually went into the construction of a telegraph line for the company, and that he advanced this money with the understanding and agreement that he was to have these notes as security therefor. Making the notes payable to Reeve was only a matter of form. The money was paid by Gage for the wire and labor, and the company had the benefit of it—there was no profit to the contractor involved in it. The company then was in debt to Gage, and could, through any agent or officer, give an evidence of that indebtedness, so that inquiry into and knowledge of all the facts would only have

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strengthened all the presumptions of the law in favor of the validity of paper.

As this case is of great importance to stockholders of the respondent, I have carefully reviewed the evidence on which the former adjudication was made, as well as the new proof submitted on the last hearing, and I feel compelled to adhere to the conclusion at which I arrived on the former trial.

It has seemed to me, from the outset, that undue stress has been placed by respondent's counsel upon the effect that the Terwilliger case should have upon this proceeding. Here this corporation, through its *de facto* officers, has contracted certain debts, for which its notes—commercial paper—have been given, which may not have been equitable, or even valid, between the original parties. These notes have passed into circulation, and are now in the hands of *bona fide* holders, who ought not to be made to suffer for the bad faith which, it is claimed, these officers have shown toward their constituency. It is surely better that these stockholders should suffer by the fraud of their own agents, than that the loss should fall on those who are within the pale of protection by the rules of commercial law.

The motion for setting aside the adjudication is, therefore, overruled.

An insolvent debtor may have his notes discounted when done *bona fide*, and still the purchaser will be protected though he know of the debtor's insolvency. *Dirby's Trustees vs. Boatman's Saving Institution*, 4 Bankruptcy Register, 195.

Consult the following on the transfer of an insolvent's property in good faith with no intent to defraud; *Wadsworth vs. Tyles*, 2 do., 101; *Darby vs. Lucus*, 1 Dillon, 164; *In re Buse*, 3 Bankruptcy Register, 52.

See further as to the binding effect of contracts made by the officers of a corporation when strictly beyond their power but under a usage, *Commercial Mutual Marine Insurance Co. vs. Union Mutual Insurance Co.*, 19 Howard, 318; *Odiome vs. Muzey*, 13 Massachusetts, 178; S. C. 15 do., 39; *Beers vs. Phoenix Glass Co.*, 14 Barbour, 358; *Smith vs. Hill Glass Co.*, 11 Common Bench, 897; S. C., 9 English Law and Equity, 442; *Allen vs. Citizens' Steam Navigation Co.*, 22 California, 28; *Butts vs. Outhbertson*, 6 Georgia, 166; *contra*, where the powers of a treasurer are expressly limited by the by-

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laws, they cannot be extended by inference from course of business. *Torrey vs. Dustin Monument Association*, 5 Allen (Mass.), 826.

An agent of a corporation authorized "to sign all notes and business paper," binds the principal by giving accommodation notes which pass into hands of *bona fide* holders before maturity. *Bird vs. Daggett*, 97 Massachusetts, 494.—[Reporter.

N. C. FULTON vs. C. A. BLAKE, ET AL.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JULY,
1873.

IN ADMIRALTY.

DEMURRAGE—DUTY OF CONSIGNEE.

1. DEMURRAGE.—Damages in the nature of demurrage are recoverable from consignee without stipulation in bill of lading.

2. REASONABLE TIME—CUSTOM OF CHICAGO.—What shall be deemed a reasonable time must always be a question of fact, to be determined by the circumstances of each case. By the custom of the port of Chicago one day is allowed the consignee to provide a dock, and this custom, unless rendered unreasonable by controlling circumstances, should be considered a law.

3. DUTY OF CONSIGNEE.—A consignee is bound to give only such dispatch as is reasonable under the circumstances.

4. Consignees must provide such reasonable dock room as their business ordinarily requires.

5. DOCK ROOM.—A consignee who has provided sufficient dock room for vessels as they arrive is not at fault with respect to causes over which he has no control several arrive together. He is not obliged to procure other docks; vessels must await their turn at consignee's docks.

6. If a consignee had provided ample docks for the accommodation of vessels consigned to him, in their order, vessels arriving out of the time when they ought reasonably to have been expected must await their turn.

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This was a libel *in personam* by N. C. Fulton, as owner of the schooner Kate Hinchman, against the respondents, as consignees, for damages in the nature of demurrage.

The facts are, stated in the opinion.

W. H. Condon, for libellant.

W. F. Whitehouse, for respondents.

As there was no charter party or express stipulation in the bill of lading for demurrage, this action cannot be maintained for demurrage as such, and the only obligation upon the consignees is upon their implied contract against an unreasonable detention. This detention must arise from the delinquency of the consignees. *Wordin vs. Bemis*, 32 Connecticut, 268; *Cross vs. Beard*, 26 New York, 85.

If a vessel is unloaded in her regular turn, there cannot be any complaint for unreasonable detention. *Robertson vs. Jackson*, 2 Common Bench, 412; *Syers vs. Jonas*, 2 Exchequer, 111; *Wordin vs. Bemis*, 32 Connecticut, 268.

If the defendant had a right to require that the cargo should be delivered upon his own dock, he was guilty of no fault or breach of contract in delaying the plaintiff's vessel until she should come up to the dock by taking her turn. *Beard vs. Cross*, 26 New York, 85.

Consignees are not liable when vessel is loaded in her turn in a reasonable time. The vessel must be improperly detained to entitle owners to damages. *Clendaniel vs. Truckerman*, 17 Barbour, 184. The question of reasonable time is to be determined on a consideration of all the circumstances. 1 Parsons on Shipping and Admiralty, 311.

It is a uniform rule that where there is no express stipulation as to the time of unloading, a consignee is not liable for delays occurring without his fault, or a failure on his part to comply with some of the obligations imposed upon him by law or a custom of the port as to unloading. *Weaver vs. Walton*, 5 Chicago Legal News, 125.

It must be averred in the libel and proved by the libellant that the delay was due to delinquency of respondent.

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The burden of showing that the detention was unnecessarily caused by the respondents, is on the libellants.

It is a material fact to show that it was not libellants' mismanagement or that of his agents. *Beard vs. Cross*, 26 New York, 85.

Ship owner must perform the voyage in the shortest time consistent with safety. *Olcott*, 110; *1 Blatchford*, 196.

BLDGERT, J.—The essential facts, as I find them from the pleadings and proofs, are: That in the latter part of September, 1871, the firm of C. A. Blake & Co., of Buffalo, N. Y., loaded on board said schooner *Kate Hinchman*, 426 tons Le-high coal, consigned to Blake, Whitehouse & Co., of Chicago, at a freight of fifty cents per ton.

The schooner sailed with her cargo on the 29th of September, and arrived in the port of Chicago on the evening of the 16th of October, with her cargo on board, and on the morning of the 17th the consignees were notified of her arrival and readiness to discharge cargo. The bill of lading contained no stipulation in regard to demurrage. The consignees were engaged in the coal business in this city, occupying two docks—one on the north branch of Chicago river, near Indiana street, capable of accommodating two vessels at a time, and the other near Eighteenth street, on the south branch, capable of unloading only one vessel at a time. Their dock at Indiana street was injured by the great fire of October 9th, and nearly all the employes at that dock were burned out, and no efficient help to unload at said dock was obtainable for many days after the fire.

When the *Hinchman* arrived, the Indiana-street dock was occupied by other vessels unloading coal, and she was directed to proceed to the Eighteenth-street dock, her towage bill being paid by respondents. This dock was occupied by the schooner *King*, which had arrived two days before the *Hinchman*, although she had sailed from Buffalo eight days after, and the *Hinchman* did not get alongside the dock so as

to commence unloading until the afternoon of the 21st, and completed unloading on the 23d of October.

The respondents' business was such that they expected to receive and unload at their docks during the months of September and October of that year about four cargoes per week, and they had ample facilities for unloading that number. The respondents unloaded vessels consigned to them in the order in which they arrived and reported themselves ready to unload. The great fire considerably deranged respondents' business, and deprived them of the use of their largest dock for several days. The usual time, at that season of the year, for a voyage from Buffalo to Chicago was twelve days. It is admitted that by a general usage and custom in Chicago the consignee of a vessel is allowed one day after notice of her arrival in which to provide a dock or place for unloading her. And it appears from the proof that the respondents had machinery at their docks, by which they were able to unload coal from a vessel at the rate of ten tons per hour from each hatch, which was much more rapidly than it could be done at any other dock.

The amount involved in this suit is not of much consequence to either party, but the principle is important to all freighters, consignees and vessel owners.

It is objected that a suit will not lie for damages against the consignee unless there is an express stipulation for demurrage in the charter party or bill of lading, and, technically speaking, the respondents' counsel may be correct; but when the consignee of goods is notified by the carrier of his readiness to deliver the goods, it is the duty of the consignee to either refuse to receive the goods, which under certain circumstances, not necessary now to mention, he may do, or to provide a place for the reception of the goods within a reasonable time, and what shall be deemed a reasonable time must always be a question of fact, to be determined by the circumstances of each case. By the usage of this port, one day is allowed the consignee of a vessel, after notice of her

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arrival, in which to provide a dock at which she can unload, and this usage, unless rendered unreasonable by controlling circumstances, should undoubtedly be considered as part of the contract.

It is also the duty of a person who is engaged in such business as to require him to expect or anticipate the arrival of vessels with cargoes consigned to him, to provide or arrange for sufficient dock-room to unload vessels as they arrive in port under ordinary circumstances within one day after arrival. That is to say, persons to whom vessels are consigned must provide such reasonable dock-room as their business ordinarily requires.

If a man's business is such that he would naturally receive two or three cargoes a week, he should provide dock-room for that number as they arrive in the order of sailing; but if, by reason of baffling winds or other delays, over which the consignee has no control, all of those vessels should arrive at once, instead of arriving in order of sailing, as he had reason to expect them, the consignee who has provided dock-room to accommodate three or four or a half-dozen vessels a week as they may successively arrive from day to day, is certainly not at fault if, from the poor sailing quality of some, or head-winds, or other causes over which he has no control, they all arrive on the same day, when he had a right to expect them on successive days in the order of sailing. And if, by reason of any such unexpected occurrence, several vessels arrive together, he is not obliged to procure other docks, but the vessels must respectively await their turns at the consignee's docks. This rule is more specially applicable to sailing vessels, which from their mode of propulsion are more uncertain in their times of arrival than vessels propelled by steam.

All persons engaged in dealing with ships, whether master, crew or consignee, are bound to give them dispatch, and whoever causes any unreasonable delay is answerable in damages.

Fulton vs. Blake.

A consignee to whom the cargo of a vessel is consigned should, within the time prescribed by the usage of the port after notice of the arrival of the vessel, furnish a suitable place for unloading, or he shall pay damages for detention, whether demurrage be noted on the bill of lading or not. It may not be what is technically called demurrage in the books, but it is damages for unreasonable detention, unless the vessel has arrived so far out of her expected time as to make such prompt dispatch unreasonable; in which case he must give her such dispatch as is reasonable under the circumstances. And probably as safe a general rule as can be laid down is that if the consignee had provided ample docks for the accommodation of the vessels consigned to him in their order, vessels arriving out of the time when they ought reasonably to have been expected, must await their turn at the docks. Although this rule may have its exceptions, and should never be vexatiously or unnecessarily enforced to the delay and damage of a vessel, the interests of commerce—and that term as used by the courts means the interest of the public—requires that ships should be kept moving.

"Ships," says one author, "were made to plough the sea, and not to lie rotting at the wharves."

Tested by these general principles, I am clearly of the opinion that the libellant has not made out a case entitling him to relief.

The respondents had provided ample dock-room for unloading the vessels consigned to them if they arrived in the order in which they might reasonably be expected. By reason of slow sailing qualities or bad management on the part of her master or crew, the *Hinchman* did not arrive till at least six days after she was reasonably due, and respondents were not bound to keep a dock waiting for her all that time, or have one ready just one day after her arrival. They are only bound to furnish her a dock in a reasonable time after her arrival, and under the evidence of this case, I do not think the delay from the 17th to the 21st unreasonable.

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The city had, only seven days before the arrival of this vessel, been visited by one of the most destructive fires ever known, destroying nearly half of its docks, two-thirds of its stores and warehouses, and rendering one-third of its inhabitants homeless. I deem this alone such an intervention of unforeseen circumstances as excused the delay which occurred. Admitting that under ordinary circumstances the respondents would have been bound to furnish the vessel with a dock within one day after notice, there were extraordinary circumstances controlling all persons doing business in this city at that time, to such extent, at least, as absolve respondents from the consequences of the delay charged in this libel.

Libel dismissed at libellant's costs.

In a recent case in the Northern District of Ohio, it was held that by the custom of lakes the consignee had twenty-four hours after the arrival of a vessel at the docks to provide a place for her and prepare for unloading, and that in unloading at an elevator each vessel should take her turn in the order of arrival; that demurrage might be recovered where there was a breach of an implied covenant or duty on the part of the consignee, even without any stipulation for demurrage in the bill of lading; that the consignee is not liable for delays occurring without his fault, or a failure on his part to comply with some of the obligations imposed upon him by law, or a custom of a port as to unloading; and that a master is bound to know the custom of a port to which he undertakes to transport freight. *Weaver et al. vs. Walton*, 5 Chicago Legal News, 125.—[Reporter.]

The Ocean Wave.

THE OCEAN WAVE.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—AUGUST,
1873.

IN ADMIRALTY.

LIBEL BY RE-INSURERS.

Re-insurers having paid to the insurer their proportions of a loss insured against, may maintain a libel *in rem* in their own names to recover of the carrier the amounts so paid, with interest, where the owner had been fully satisfied for the loss by the original insurer.

This was a libel by the Home Insurance Company of New York, and the Merchants' Insurance Company of the city of Chicago, re-insurers, against the steamboat Ocean Wave. The St. Paul Fire and Marine Insurance Company of the State of Minnesota made assurance upon a cargo of wheat shipped by Beaupre & Kelley on said steamboat, to be transported from St. Paul to Prairie du Chien. The libellants severally re-insured the St. Paul company in a portion of the amount of its policy. A portion of the cargo being damaged, the St. Paul Insurance company paid the amount of the loss to the insured. These two insurance companies paid to the St. Paul company their respective portions of the loss, and bring this libel to recover of the steamboat the amount so paid, with interest, claiming to be subrogated to the rights and interests of the original insurer, and the owner and the shipper in the bill of lading.

In regard to the several policies of insurance, the answer of the claimant neither admits nor denies, but leaves the libellants to make such proof in reference thereto as they may be advised.

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The evidence submitted at the hearing on the merits, was the policies of insurance and the receipts for the payment of proportions of the loss, according to the contracts of re-insurance.

Pursuant to an order of reference, the commissioner reported the several amounts, paid by the libellants, of the loss with interest, to which the claimant's counsel filed exceptions, that the libellants were not legally nor equitably subrogated to the rights and interests of the owners and shippers, and have not thereby any claim or right which they can enforce against the steamboat or the claimant. The libel alleges, that by reason of the re-insurance and the payment of the proportion of the loss, these libellants are subrogated to all the rights and interests of the St. Paul Insurance Company and of the owners and shippers in the bill of lading.

N. J. Emmons, for libellant.

J. W. & A. L. Carey, for respondent, cited *Herckenrath vs. American Mutual Insurance Co.*, 3 Barbour's Chancery, 63; *Hastie vs. DePeyster*, 3 Caines, 190; *Eagle Insurance Co. vs. Lafayette Insurance Co.*, 9 Indiana, 443; *Hoe vs. Mutual Insurance Co.*, 1 Sandford, 137; *King vs. The State Mutual Fire Insurance Co.*, 7 Cushing, 1.

MILLER, J.—This libel is not founded on a privity of contract between the libellants and the shippers or owners of the cargo. There is no such privity of contract. The insured had no claim or demand, either legal or equitable, against these libellants upon their policies of re-insurance.

The libellants re-insured the St. Paul Insurance Company as to portions of its risk. Their contracts were directly with that company, and bound them to pay certain portions of the loss. The libellants indemnified the St. Paul company against paying the whole loss, to the extent of their policies of re-insurance, which they have paid. They stood in the na-

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ture of sureties to the St. Paul company. It is a certain and fixed rule in equity that sureties, upon paying the debt, or a portion of it, become entitled to collaterals or securities in the hands of the principal, not by privity of contract, but upon the principle of subrogation, or as equitable assignees.

The shipper has been fully satisfied for the loss by the St. Paul Insurance company, but in part with funds contributed by the libellants upon their policies of re-insurance. The carrier is not presumed to know, or bound to inquire, as to the relative equities of parties claiming satisfaction for the loss. Nor can the carrier be allowed, in a court of admiralty, to set up as a defense the equities between the insurer and the insured, or between several insurers, unless he has made full satisfaction to the proper party in interest, as the owner or the shipper.

In admiralty, the insurer, if he has the equitable right to the whole or any part of the damages, may intervene and become the *dominus litis*, when he can show an abandonment of the insured property, or satisfaction of the loss insured against.

The insured might have brought a libel for the use of these several insurance companies; or the St. Paul Insurance Company might have brought its libel for itself and for the use of these libellants. And if the use were not expressed in the record, the insurance companies, or any of them, could intervene for their interests, even after a decree. If such be the practice in admiralty, why should not these libellants be permitted to maintain this libel?

"A mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may be afterwards recovered from other parties on account of the loss. The effect of the payment of a loss is equivalent in this respect to that of an abandonment."¹

¹ Phillips on Insurance, § 1723, 32; *The Keokuk*, 1 Bissell, 522; *The Ann O. Pratt*, 1 Curtis, 340; *The Propeller Monticello vs. Mollison*, 17 Howard, 152; *Hill & Long vs. The Nashville & Chattanooga R. R. Co.*, 13 Wallace, 367.

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I have disposed of the exceptions without regard to the question whether the matter presented should not have been alleged in the answer.

The exceptions are overruled, and a decree is ordered for the libellants.

An appeal was taken to the Circuit Court, and was heard at the April Term, 1875, before Drummond, J., who, in a short oral opinion, expressed concurrence in the judgment of the District Judge and affirmed the decree.
—[Reporter.

THE MANISTEE.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—AUGUST,
1873.

IN ADMIRALTY.

1. **LIBEL BY INSURER.**—In case of a total loss of a cargo by collision, a libel may be brought by the insurer against the colliding vessel, after notice and proof of the loss and demand of payment, though without actual payment.

2. **WHEN WILL LIE, THOUGH LOSS NOT ACTUALLY PAID.**—The insured having been fully satisfied for the loss, and not intervening or opposing the prosecution of the libel of the insurer, the carrier can not be permitted to raise the objection of non-payment of the loss before libel brought.

3. **POLICY ISSUED IN DISREGARD OF STATUTORY REQUIREMENTS.**—Where the statutes of a state require foreign insurance companies to comply with certain requirements, and declare penalties for doing business in disregard of these requirements, in case of a loss on a policy issued in disregard of such requirements, a carrier can not be permitted to make this a defense to a libel, the loss having been paid by the company.

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This was a libel by the Traders' Insurance Company of Chicago and the Orient Mutual Insurance Company of New York, against the propeller Manistee, to recover the amount of \$10,700 insurance paid by them on the cargo of the schooner S. Robinson, which was sunk by collision with the Manistee.

The facts are stated in the opinion.

Emmons & Markham, for libellants.

Finches, Lynde & Miller, for respondent.

MILLER, J.—On the 23d of May, 1872, at Chicago, there was shipped on board the schooner S. Robinson sixteen thousand and five bushels of corn, of the value of ten thousand and seven hundred dollars, to be transported on board of said schooner to Kingston, Canada. The Traders' Insurance Company made and delivered to the shipper a policy on said cargo, in the sum of five thousand seven hundred dollars, and the Orient Mutual Insurance Company in the sum of five thousand dollars, against the risks of collision and of the perils of the lakes.

The schooner, while on her trip down the lakes with the cargo on board, was damaged by collision with the propeller Manistee, on the 24th of May, 1872, so that she sunk, and her cargo became a total loss, rendering thereby the libellants liable to pay therefor.

Proof of loss was made May 28, 1872. May 30, notice of the loss was given these insurance companies, and of an abandonment to them, with claim for a total loss. This libel was filed and monition issued May 31. June 12, 1872, the Orient Mutual Insurance Company paid five thousand dollars, the amount of their policy. In case of loss, by a condition of the policy issued by this company, the loss is payable in thirty days after proof of interest in the property insured.

The libel alleges that payment of the loss had been made by these libellants, which is a mistake as to the Orient Mutual

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Insurance Company, but it had been made by this company within thirty days after the loss, according to the proofs in support of the libel. The policy of the Orient Mutual Insurance Company was issued by an agent in Chicago. There is no evidence that the agent of this company who issued the policy had authority to do the business under the laws of the state of Illinois.

It was contended by counsel at the hearing that the policy is void for having been issued in disregard of the requirements of the laws of that state. The statute laws of Illinois on this subject were read at the argument, from pages 595, 596, 597, 598, 599, of D. B. Cook & Co.'s edition, vol. 1. These laws require that insurance companies incorporated and located in states other than the state of Illinois, produce certain statements respecting their liability and condition, and procure from the auditor of the state authority to transact business within the state. And it is further declared that it shall be unlawful for an agent to do business without having first complied with those laws. And upon conviction for violating these requirements, punishment by fine or imprisonment, or both, may be imposed.

Those statute laws do not declare void policies issued by foreign companies through a local agent in disregard or violation of them. The object of these statutes was for the security of citizens doing business with such companies, by bringing them as near as possible to local corporations, and also as a provision for revenue. Where a statute prohibits or annexes a penalty to its commission, the act is made unlawful, but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. Where a statute is silent, and contains nothing from which the contrary can properly be inferred, a contract in contravention of it is void. But the whole statute must be examined in order to decide whether or not it does contain

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anything from which the contrary can be properly inferred.¹ There is no penalty pronounced against a person for obtaining a policy from, or doing business with, the company that has not complied with the requirements of those statutes. The insured in this case obtained the policy upon the payment of the premium, and has received from this company full satisfaction for the loss.

If the owner of the cargo had not taken a policy from the agent of this company, but had shipped without insurance, he would be entitled to recover of the carrier for the loss, the value of the cargo. In my opinion, the carrier should not be permitted to make this defense. The shipper might have brought a libel for the use of the company, and if the use were not expressed in the record, the court would protect the company, even after a decree in favor of the libellant.

This brings me to the consideration of the second objection to a decree for the Orient Mutual Insurance Company in this libel. The point presented is the non-payment of the loss prior to bringing the libel.

Notice of a total loss of the cargo insured was given by the insured to the insurance company prior to the bringing of the libel, and demand of payment made. Where there is a total loss there is no necessity for a formal instrument of abandonment. A total loss, with notice and demand of payment, is equivalent to an abandonment and acceptance. The insured renounces and yields up to the insurers all the right, title and claim to what may be saved. The insurer then stands in the place of the insured, and becomes legally entitled to all that can be rescued from destruction. "Where the thing insured, and every part of it, is completely gone out of the power of the insured, it is just and proper that he

¹ *Harris vs. Runnels*, 12 Howard, 79; *The Ocean Insurance Company vs. Polleys*, 18 Peters, 157.

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should receive at once as for a total loss, and leave the *jus recuperandi* to the insurer."¹

"The insured has a right to call upon the underwriter for a total loss, and of course to abandon as soon as he hears of such a calamity having happened, his claim to an indemnity not being at all suspended by the chance of a future recovery of part of the property, but because of the abandonment that chance belongs to the underwriters."²

The payment of a total loss by the insurers, or their liability to pay such a loss, in consequence of an abandonment, gives them an equitable right to the property, or what remains of it, so far as it was covered by the policy. And the abandonment, considered as an assignment of property, must have reference to the time of the loss.³

It is a universal rule that all rights, claims and interests which are indispensably connected with the property insured, pass to the insurer by an abandonment of the property, so far as the same belonged to the insured, and to the extent of the interest covered by the policy; as a right to contribution for general average, all claims for negligence or any misconduct causing injury to the property, as for collision or for injury to goods, or for an indemnity from a foreign government.⁴

Under the 34th Admiralty rule, an insurer who has accepted an abandonment, which divests the original claimant of all interest, may be admitted to intervene, and become the *dominus litis*.

The Brig Ann C. Pratt, 1 Curtis, 340: In this case it does not appear that the insurance company had satisfied the insured for the loss. "And the insurer may be allowed to intervene and become the *dominus litis*, when he can show an abandonment which divests the original claimant of all

¹ Marshall on Insurance, B. I. A. 14.

² Park on Insurance, Ch. 9; *Comegys vs. Vasse*, 1 Peters, 103.

³ 2 Phillip on Insurance, § 1707.

⁴ Arnould's Marine Insurance, 4th Ed., by MacLachlan, 868.

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interest. But with this the respondent has no concern, nor can he defend himself by setting up these equities of others, unless he can show that he has made satisfaction to the party justly entitled to receive the damages."¹

The owner and insurer in respect to the property and the risks incident thereto may be considered as one person, having the beneficial right to indemnity from the carrier. The notice of the total loss, with demand of payment according to the terms of the policy, vested in the insurance company the exclusive title to the insured property, and fixed the liability of the insurer to pay the amount of the policy within thirty days. And upon the equitable principles of admiralty, the insurer being considered in the nature of a surety should not be required to satisfy the insured prior to instituting a libel against the carrier, when the insured does not object, nor intervene for his interest. In this case the insured was fully satisfied for the loss, and the carrier should not be permitted to oppose the prosecution of this libel on the part of the Orient Mutual Insurance Company.

Decree for libellants.

¹ *The Propeller Monticello vs. Mollison*, 17 Howard, 153, 156; *Rogers vs. Holly & Jarvis' Executors*, 18 Wendell, 349.

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In re GUY WILSON.CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—AUGUST
1873.

IN BANKRUPTCY.

SUSPENSION OF PAYMENT.

1. **SINGLE NOTE SUFFICIENT.**—The non-payment by a merchant for fourteen days, without legal excuse, of a single piece of commercial paper, is an act of bankruptcy, without reference to whether he is actually insolvent.

2. **SOLVENCY IS NO ANSWER.**—It is no answer to a petition in bankruptcy that the respondent is solvent, and the only justification for non-payment of commercial paper is a legal one, as that he was not liable upon it.

3. One of the objects of the bankrupt law was to compel merchants to pay their commercial paper as it fell due, under penalty of being adjudged bankrupt, if non-payment was continued without legal excuse for fourteen days.

4. **PRIMA FACIE CASE SUFFICIENT.**—In an involuntary petition it is not necessary to negative all the circumstances which might excuse the non-payment. For a rule to show cause it is sufficient that a *prima facie* case be made. And where the petition alleged that the debtor had suspended payment on his commercial paper for more than fourteen days and had not yet paid the same, that he was a merchant, and that the petitioners knew of no reason for the non-payment except the neglect or inability of the debtor, *held*, it was *prima facie* an act of bankruptcy.

Petition for review.

The original proceeding was a petition in bankruptcy filed by P. Vanvalkenburg & Co. against Guy Wilson, a merchant doing business in Chicago, alleging as an act of bankruptcy, that on the 2d of June, 1873, he suspended payment of his commercial paper, and had not resumed payment of the same within a period of fourteen days thereafter, nor at any time since. The commercial paper referred to was a

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promissory note for \$509.79, due June 2, 1873, and held by petitioners. The petitioners stated that they knew of no cause for the non-payment of this note except neglect or inability of the said Wilson. The affidavit accompanying the petition did not show any other act of bankruptcy, or that the respondent was actually insolvent.

On this petition the District Judge made the following order:

"There being no sufficient evidence of actual insolvency, I do not deem it proper to enter a rule to show cause on this petition. I hold that suspension of payment for fourteen days on a single piece of paper does not alone show insolvency. Petition dismissed."

The petitioners thereupon filed this petition for review.

McClellan & Hodges, for petitioners.

The application for the rule is *ex parte*, and the only question for the court to pass upon is, are the petition and accompanying depositions in due form, and do they properly allege an act of bankruptcy?

All matters of defense or in explanation can only be offered by the debtor in response to the rule, and any possible excuse the debtor may have need not be anticipated and negatived by petitioner, and the suspension of a single piece of commercial paper by a merchant, and non-resumption for a period of fourteen days, is *prima facie* an act of bankruptcy. *Katzenberg vs. Lowenstein*, 2 Bankruptcy Register, 99; *In re John Weikert et al.*, 3 do., 5; *Heinsheimer vs. Shea*, Id., 46; *In re Hollis*, and *In re Kenney*, Id., 82; *In re Nikodemus*, Id., 55; *In re Thompson & McClellan*, Id., 45; *In re Wells*, do., 37; *In re Chandler*, 4 do., 66; *In re Chappel*, Id., 176; *Shaffer vs. Fritchery*, Id., 179; *McLean vs. Brown*, Id., 188; *In re Skelley*, 5 do., 214; *In re Baldwin vs. Wilder*, 6 do., 85; *In re Kenyon & Fenton*, Id., 238; *In re Carter*, Id., 299; *In re Hercules Mutual Life Assurance Society of the U. S.*,

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Id., 338; *In re Ess & Clarendon*, 7 do., 133; *In re Mannheim*, Id., 342; *In re Munn*, Id., 468; *In re Raynor*, Id., 527.

DRUMMOND, J.—The 39th section of the bankrupt law as amended by the act of July 14, 1870, declares that any one who “being a banker, broker, merchant, trader, manufacturer or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days,” has committed an act of bankruptcy, and may be adjudged a bankrupt on the petition of one or more of his creditors.

The 30th section sets forth various acts which constitute bankruptcy, one clause of which has just been cited. There was a difference among judges as to the true construction of the original clause of the 39th section, and to remove this doubt it was amended by the act of 1870, and the question is now presented whether the petition brings the parties, both creditor and debtor, within this amended clause of the 39th section.

It has in several cases been stated that there may be a suspension of payment of commercial paper for a period of fourteen days, which does not of itself constitute an act of bankruptcy. For instance, the paper may not be valid, or there may be a set-off against it; or, from some cause, the party may not be legally bound to pay it. In such cases the courts have held that the suspension of payment does not constitute an act of bankruptcy, because in point of fact there is actually no indebtedness; or if there is, it is offset by an indebtedness on the other side, so that there is no legal obligation to pay.¹

The ground upon which the District Judge decided the case was that the fact of one piece of commercial paper being

¹ For such cases, consult *In re Thompson*, 3 Bankrupt Register, 45; *In re Chandler*, 4 do., 66; *M. & M. National Bank vs. Porday's Bend Iron Co.*, 5 do., 491; *In re Munn*, Vol. 3 of this Series, 442.—[Reporter.

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unpaid was no sufficient proof of insolvency. The question then arises, whether on that ground can be based the refusal of a rule to show cause.

The point, it will be observed, is, whether a party has, *prima facie* upon the papers as they appear, committed an act of bankruptcy within the meaning of the 39th section, and whether insolvency is an indispensable element entering into and constituting the act of bankruptcy. I think it is not.

The real question is, whether, being a merchant or trader, he has suspended payment of his commercial paper for fourteen days, within the meaning of the law. Of the various acts which the 39th section declares to constitute acts of bankruptcy, most of them do not refer to insolvency at all. For instance, the departure from the state, district or territory of which the debtor is an inhabitant, with intent to defraud his creditors, is an act of bankruptcy. Where a debtor conceals himself to avoid the service of legal process in an action for the recovery of a debt or demand provable under the bankrupt act, he commits an act of bankruptcy. The concealing or removing any of his property to avoid its being attached, taken, or sequestered on legal process, is an act of bankruptcy. So with many other acts declared to constitute bankruptcy, as where the debtor has been actually imprisoned for more than seven days in a civil action founded on a contract for the sum of one hundred dollars or upward. In all these cases insolvency is not an element.

Then comes the further definition which the District Judge has apparently applied by analogy to the particular circumstances of this case: "Or who being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any gift, grant, sale, conveyance," etc.

Some of the courts have intimated that "suspension of payment" means a general suspension of payment, and not the suspension of payment of a single piece of commercial paper; and it is in carrying out that view that the District Judge

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has held there must be an allegation of insolvency.¹ But the question is, whether it is competent for a man, being a merchant, to suspend payment of any of his commercial paper and bid a creditor defiance, and then to turn round and allege in answer to an application to declare him a bankrupt, that he is solvent and therefore a proceeding in bankruptcy can not be instituted against him.

I hold that allegation to be no answer to a petition in bankruptcy under such circumstances. It is not enough for him to show as a reason why a decree in bankruptcy should not go against him, that he is solvent, and because of spite or caprice, or some other similar cause, he does not choose to pay his commercial paper. The reason which alone can prevent the non-payment of commercial paper and its continuance for fourteen days, from constituting an act of bankruptcy, must be a legal reason, such as to enable a court to say that it is not within the scope and meaning of the bankrupt law, because the debtor was legally justified in not making payment.

Upon the face of this petition no legal reason appears for the non-payment of this commercial paper within fourteen days after maturity, and the petitioners say they know of none. If there is any legal reason, it is for the debtor to show it before the bankrupt court. *Prima facie* a case is made out against the respondent, and the question of solvency or insolvency is not material.

A solvent merchant cannot, therefore, refuse to pay his commercial paper, and then defend himself from a petition in bankruptcy on the ground that he is solvent. One of the very objects of the bankrupt law was to compel merchants to pay their commercial paper as it fell due, by holding over them the consequences of its non-payment, if continued for fourteen days.

¹ For such case, see *In re John Clemens*, 5 Chicago Legal News, 511. —[Reporter.

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Possibly there should be a different rule, because if a man is solvent he can be proceeded against in the ordinary way, but the bankrupt law has not so provided. Insolvency does not constitute an element of the act of bankruptcy in this case, as it does not in most of the cases set forth in the 39th section.

If it be said that we can suppose a suspension of payment of commercial paper for fourteen days which does not constitute an act of bankruptcy, the answer is that it is not possible for the petitioner to recapitulate all the various circumstances which might negative any supposed case, and thereby exclude it from the operation of the bankrupt law.

The District Judge has required an allegation of insolvency. Something else might be required to be negatively set forth in the petition, which, if it existed in point of fact, would show that the act was not one of bankruptcy.

We cannot, therefore, require that the petitioner should set forth by negative allegations, all the particular circumstances which by possibility might show the non-payment to be within the meaning of this clause of the bankrupt law. It is sufficient that a *prima facie* case is made upon the petition.

It is for the debtor to make explanation or defense.

Again, if it be said that the non-payment for the given period must be a "general" suspension, where is the line to be drawn? On how many pieces of commercial paper must payment be suspended in order to constitute an act of bankruptcy? The statute has not declared that suspension of payment on any particular number of notes or bills of exchange shall constitute an act of bankruptcy, but the language is, "his commercial paper," and it will be found impracticable to adopt a rule which limits the non-payment to some certain number of notes or bills of exchange in order to constitute an act of bankruptcy.

For these reasons I think the order of the District Judge was erroneous and must be reversed; and that the petitioners are entitled to a rule to show cause.

Nusbaum *vs.* Emery.

By section 12 of the Amendment to the Bankrupt Act, passed June 22, 1874, section 39 of the original act is so changed as to require a suspension of payment of commercial paper forty days, to constitute an act of bankruptcy.—[*Reporter.*]

ADOLPH NUSBAUM *vs.* ENÖCH EMERY.

CIRCUIT COURT. — NORTHERN DISTRICT OF ILLINOIS. — AUGUST, 1873.

1. COURT WILL RETAIN JURISDICTION TO PROTECT REAL PARTY IN INTEREST.—Where by collusion between the nominal parties to the record, a suit had been prosecuted to final judgment in the State Court, pending proceedings in this court, this court will not allow the proceedings here to be dismissed against the wish of the real party in interest.

2. The fact that the defendant in the state court did not plead the pendency of the suit in this court is evidence of collusion between the parties.

3. MONEY HELD BY NOMINAL PARTY — WHEN ORDERED INTO COURT. — Where money in controversy in a suit is held by a nominal party, solely as trustee for another person not a party to the record, the court, at the instance of the party in interest, may order it to be paid into court.

4. Where the holder of money, being an officer of the Government, had ceased to be such during the pendency of the suit, the court should order the money to be paid into court.

This was a motion by the plaintiff in similar cases, to set aside an order re-instating the cases on the docket, and also a motion by Isaac P. Tice for a rule upon defendant to show cause why he should not pay into court the money in controversy in the several cases.

The suits were brought in the Peoria Circuit Court by distillers in the Peoria District, against the defendant, the U. S. collector for that district, to recover money deposited

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by them severally, under the revenue law, to pay for meters for their distilleries, to be furnished by Tice, under the regulations of the commissioner of internal revenue.

The plaintiffs being dissatisfied with the meters, and their use having been soon abandoned, brought these suits, claiming the laws and regulations requiring the use of these patented meters were unconstitutional and void.

The cases were removed to this court on the application of the defendant, and on the 25th of February, 1873, the demurrer to defendant's pleas was overruled, but no formal judgment entered, and twenty days given plaintiffs to elect whether they would stand by their demurrer or withdraw their demurrer and plead to the merits.

The record stood in this manner until about July 1st, when the attorney for the defendants appeared and asked that judgment be entered upon the demurrer. Notice was forwarded to the attorneys of the plaintiff, and on the 8th of July plaintiff's attorney came into court and dismissed the suits.

C. A. Roberts, for plaintiff.

Harding, McCoy & Pratt, for defendant.

J. R. Doolittle & Son, for Isaac P. Tice.

BLONDETT, J.—At the time of the dismissal of these suits about July 1st, there was no appearance on the part of the defendant, and it did not occur to the court that there was any impropriety in the plaintiff's dismissing his own suit, as probably would have been the result if judgment had been entered upon the demurrer unless my attention had been called to the special stipulations hereafter referred to.

A few days after this dismissal it was brought to the notice of the court that after the decision upon this demurrer a suit had been brought by one of the plaintiffs in these common law cases, D. C. Farrell, upon the equity side of the cir-

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cuit court of Peoria county, against Emery and Tice, setting up that he, the complainant, was the owner, in his own right, of the money which he had paid for the meter which he had ordered, and was the owner, by assignment, from the various other distillers, of what they had respectively paid; that the money was wrongfully withheld by Emery, the collector of the district; and praying relief in the premises. The suit thus commenced proceeded to hearing, upon the default of Emery, Tice being brought into court by publication, and his default being also entered, a final decree was entered on the 25th of June last, and on the 7th day of July, the day before these cases were dismissed, as the record now produced in court shows, Mr. Emery paid over to Farrell, the complainant in that suit, the amount of money in his hands growing out of the Tice meter transaction.

From the time these cases were first brought to the notice of the court, it has been apparent upon the record that this was really a suit between these various distillers and Tice, and not between these men and Emery; that Emery had no interest in the matter, was merely a stakeholder of the money, and was in no wise concerned in the result of the suit. His plea stated that substantially, and the various stipulations which have been placed upon the record in the case, and the statements of counsel, have shown that counsel who appeared for Emery appeared, in point of fact, at the instance of Tice, were employed by Tice, and acted in the interest of Tice, and that Emery's name was merely used as the nominal defendant, the money in his hands being the money of either the plaintiff or of Tice, and not in any event the money of Emery.

Counsel who had appeared in the case for the defendant, under these circumstances called the attention of the court, by an affidavit, to the fact that this suit had been brought in Peoria, that Emery had paid these sums over to the complainant Farrell, and asked upon this affidavit that these cases should be re-instated, claiming that he was entitled to a judgment upon

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the demurrer, and to an order that the money should be paid to Tice, producing a stipulation, entered into between the counsel about the 30th of March, 1870, a copy of which was preserved from the fire of October 9, 1871, by having been transmitted to counsel engaged in certain cases of the same nature in New York. This stipulation is as follows:

Enoch Emery *ads* Nusbaum *et al.* In all the Tice meter cases, including the above, pending in the United States Court, Northern and Southern district of Illinois, and in State courts, we agree that the trial of the one shall be conclusive of all other cases where the facts are substantially alike. And that, upon the trial of that case, the certificates of United States collectors as to the time when meter was ordered, and when bill of lading was received, and of all other facts of record in the collector's office, shall be taken without objection.

And we further agree that for the distillers we will make and rely upon the following points:

First—That the law compelling the distillers to use the meters is unconstitutional, and that the commissioner of internal revenue had no legal right to compel distillers to purchase or use the same at their expense.

And that the meter was of no value. Of all which Tice had notice.

The legal questions shall be argued before the court, before any proof is taken, and the court may give time to take such evidence as the ruling of the court may render appropriate. We will argue the case in the United States Circuit Court, Northern District, Illinois.

The defendant insists that the value or want of value is immaterial in the absence of fraud or bad faith on the part of Tice.

All the orders of the revenue department may be read by either party, on hearing argument or trial, and should plaintiffs finally be beaten, then the court may order the money in the collector's hands, in all cases, to be paid to Tice.

[Signed]

INGERSOLL & McCUNE,
For plaintiffs in said several cases,
DOOLITTLE & NORTON.

[Signed]

Defendant's attorneys in said several cases.

All the cases in this court, on the common law side, were submitted on demurrer, and, as I understood, it was expected that they would be substantially disposed of by the demurrer. It was only because the plaintiffs were not in court by their counsel at the time the demurrer was disposed

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of, that the matter was allowed to rest. The decision was given in the winter time, in precarious weather, and I thought it very possible they might not have received the notice, or that it might have been impossible for the plaintiffs' attorneys to be here on the appointed morning. Therefore time was given them, simply as a matter of courtesy, as I supposed, in order that they might decide whether they would abide by the demurrer or whether they would still insist upon some proof being taken; but, as I said before, I understood that all the important questions in the cases were disposed of, and that any further action would be merely *pro forma*.

On the entering of the motion to re-instate the cases I sustained it, on the ground that they had been improvidently dismissed.

Defendants' attorneys then asked for a rule against Mr. Emery, to show cause why he should not pay this money into court. The rule was granted. On the return of the rule, Mr. Emery appeared, by his counsel, and moved to set aside the order re-instating the cases, and to dismiss or re-dismiss the cases. The motions for a rule against Emery to pay the money into court and to dismiss the cases were argued a few days since, and, after mature consideration, I can see no reason for changing the order formerly made on the re-instatement of the cases on the record. I think in the present status of the record, and in view of what has transpired elsewhere, it is the duty of this court to retain these cases within its own control, and within its jurisdiction, for the purpose of protecting the rights of the real parties in interest in the litigation.

I can not look upon the proceedings at Peoria, whereby an attempt, at least, was made to obtain the adjudication of the Peoria Circuit Court upon the matters in controversy between the parties, as anything less than a fraud upon the jurisdiction of this court, and the real parties interested in the suits here. It seems to me that this is as mild a term as the court should, in justice to itself and to the parties, apply to the

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transaction, although it is not intended to impute any intentional fraud to the Peoria Circuit Court.

Here was a court of competent jurisdiction, and having jurisdiction of the subject matter and parties, where the case had already been heard, where the delay in entering the final judgment was purely out of courtesy to the plaintiffs, and where the court had the undoubted right, under the stipulation, to order the subject matter of the litigation to be paid into court for the purpose of protecting the rights of the party in interest. In the face of these stipulations, and the rights of Tice, the plaintiffs, with the connivance of the defendant, and, as it appears, by collusion with him, enter into an agreement by which a suit is to be instituted before another tribunal, decree rendered, and the money paid over to the plaintiffs on that decree.

I say there must have been collusion between these parties, because I can hardly conceive that these plaintiffs could, without an understanding with the defendant, have deemed it possible for them to carry through, to a successful termination, this late Peoria suit. It was Emery's right to have plead at once to that suit the pendency of these suits, and the plaintiffs must have known he would have done so if he was not acting in their interest and in collusion with them. This court cannot but conclude from the admitted facts that there was an understanding between Emery and these plaintiffs in regard to the bringing of the suit in Peoria, and that the suit was brought by collusive arrangements between them. The plaintiffs would not have dared to have brought such a suit; they would have known they would have been met on the threshold by a plea in abatement which would have inevitably thrown them out of court, if the defendant was acting in good faith for the interest of Tice. But, so far from that being the case, no such plea was interposed; the rights of the party in interest are not at all protected by Emery, but he suffers the court to take default against himself and Tice, the party in interest, and allows decree to be

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entered, simply protecting himself, as he states in his own affidavit, by taking a bond of indemnity from Farrell. By doing that, he shows that he has no confidence, after all, in the validity of the proceedings, because he must be held to know that the decree of a court of competent jurisdiction, honestly rendered, is protection enough, and that he needed no bond or other indemnity. But the whole transaction, taken together, satisfies me that this was a somewhat ingenious attempt to evade the jurisdiction of this court, and to evade the stipulations which these plaintiffs had themselves entered into, and which were binding on them in this forum.

Without charging that Mr. Emery intended to be himself a party to this fraud, I think his position must probably be construed to be about this: He is a neighbor of these parties; he has heard their assertions made so repeatedly, and reiterated so frequently, in regard to this meter being worthless, that he perhaps sympathizes with them in their attempts to recover this money back. He perhaps feels that they should not have been compelled to purchase these meters, and that, therefore, he, as a good neighbor, ought to facilitate their effort to get back their money. But he certainly ought not to do it at the expense of violating his own stipulations, made in the interests of the party whom he really represented. His relation to Mr. Tice was that of a trustee for him, and he ought not to have been guilty of a collusive arrangement by which the funds belonging to Mr. Tice should be placed in any other custody than that in which they were at the time of the commencement of the original suit.

Therefore, I think the court did right in restoring the cases in the first instance to the docket, setting aside the order of dismissal as having been improvidently entered, and requiring the rule to be entered that the defendant should show cause why this money should not be paid into court.

I have no doubt but at common law, where the record shows that money is held by a nominal party, either plaintiff or defendant, solely as trustee for the benefit of some other per-

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son, not a party to the record, it is the right of the court, at the instance of the party in interest, to order the money in controversy to be brought into court.

I say I have no doubt that that is one of the common law powers of a court of law as well as of a court of equity, but if I had any doubt on this question, it would be entirely set at rest by the stipulation in the case. The pleas of Emery, the defendant, state emphatically and solemnly that he has no interest in this money. The stipulation provides that whenever the court has disposed of these cases, it shall order the money to be paid to Tice, if the decision be in his favor, and the court can only do that by ordering the money to be first paid into court, and then order it paid to Tice,—at least that would seem the most regular way.

At the time these suits were brought, Mr. Emery was an officer in the United States government, and the proper custodian of the money. Since the bringing of these suits, he has ceased to be such officer, and is no longer the proper custodian of this money, either for Tice or the Government,—the controversy being in one sense between the distillers and the Government.

I can, therefore, see no reason why the court should not make an order that the defendant pay this money into court. I think it a duty the court owes to itself and to the parties, that it should not allow its jurisdiction to be evaded by a cunning shift of this character, and that the administration of justice between parties-litigant in this tribunal should not be thwarted by a case of this kind.

An order will therefore be entered that Mr. Emery pay the money in all these cases into court within twenty days from this time.

Payment to a nominal plaintiff in a suit is not a satisfaction of the debt. *Triplett vs. Scott*, 12 Illinois, 137.—[Reporter.]

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In re RACHEL GOODMAN.

DISTRICT COURT.—DISTRICT OF INDIANA.—SEPTEMBER, 1873.

IN BANKRUPTCY.

MARRIED WOMEN.

1. In Indiana a petition in bankruptcy will not lie against a married woman where it is not shown that she has a separate estate.
2. The statute not having removed her common law disabilities, she is still incompetent to contract.
3. The district court will consider the state statutes and decisions, in applying the bankrupt law to married women.

This was a proceeding in bankruptcy, instituted by Hays, Gibbons & Co., of St. Louis, against Rachel Goodman, a married woman.

The petition is in the usual form, and charges that Mrs. Goodman is the wife of Morris Goodman; that for several years last past she has been a resident of the city of Evansville, Ind., where she has been engaged in business in her own name, buying and selling goods, wares and merchandise; that she is indebted to petitioners in the sum of \$487.27, for goods sold and delivered, which sum is due and unpaid, and within six calendar months next preceding the filing of said petition, she committed an act of bankruptcy, describing it.

The respondent moved to dismiss the petition for want of jurisdiction.

Judge Warren, for petitioning creditor.

Shackelford & Richardson, for respondent.

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GREESHAM, J.—By the common law, married women are disabled generally from contracting or engaging in trade. There are exceptions to this rule, having their foundation in special local custom, or upon the principle that the marriage is for the time suspended. Of the latter character is the statute of this state, which authorizes a married woman, whose husband has left the state, or has abandoned her without providing for her maintenance, or who is confined in state's prison, to sue and be sued as a *feme sole*, to sell and convey her real estate, and to receive payment for her own labor and that of her minor children.

Whether this proceeding can be maintained, depends upon how far the legislature of Indiana has gone in changing the common law concerning the rights of married women. The following statutes upon the subject are all that need be referred to:

A married woman's lands, and the profits thereof, are not liable for her husband's debts, but shall remain her separate property, as if she was unmarried, except that she shall not incumber or convey such lands, otherwise than by deed, in which her husband shall join.¹

Personal property of the wife, held by her at the time of her marriage, or acquired during coverture by descent, devise, or gift, remains her property to the same extent and under, the same rules as her real estate so remains.²

When a married woman is a party, her husband must be joined with her, except when the action concerns her separate property, she may sue alone; and, when the action is between herself and her husband, she may sue and be sued alone.³

The decisions of the Supreme Court of Indiana, interpreting these and other statutory changes on the same subject, are in-

¹ 1 G. & H., 374, Sec. 5.

² 1 G. & H., 295, note.

³ 2 G. & H., 41, Sec. 8.

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volved in much confusion and doubt; but the following rulings are sufficient to dispose of the question presented in this case:

The statute extends only to such personal property of the wife as she had at the time of her marriage, or acquired during coverture by descent, devise, or gift, leaving the common law, with respect to the wife's earnings, unchanged; and if the wife engage in any trade or business without means of her own, that is, without means acquired in some one of the ways mentioned in the statute, the profits of such trade or business belong to the husband, for they are as much the earnings of the wife as any other income produced by her labor or skill.¹

If a married woman, having no separate estate or means of her own, carry on business with the knowledge and consent of her husband, it is regarded as the business of the husband, and the husband is liable for the contracts of the wife thus entered into, on the theory that the husband is the principal and the wife the agent.²

The separate personal estate of the wife, including the issue and profits of her real estate, she may dispose of as a *feme sole*, and when she has indicated her purpose to deal with such personal estate, a court will give effect to her contracts if they be of a character to result in benefit to her; and the wife may, without the consent of her husband, contract for the repair and betterment of her real estate, and such contracts will be enforced in equity.³

The separate estate of a married woman is not liable for her general engagements. Her capacity to enter into binding contracts exists only when she has a separate property, and when her contracts relate to that property.⁴

¹ *Baxter vs. Prickett's Administrators*, 27 Indiana, 490; *Jenkins, Assignee, vs. Flinn*, 37 Indiana, 349.

² *Jenkins vs. Flinn*, *supra*.

³ *Kantrowitz vs. Prather*, 81 Indiana, 92.

⁴ *Id.*

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A married women may carry on trade with her separate money, and may employ her husband to manage her trade,¹ but she cannot enter into a contract of co-partnership with her husband.²

I am not able to see any reason for this distinction. If a married woman may engage in trade with her own means as a *feme sole*, why may she not become a partner in trade? If she may embark with her own separate means in general trade and merchandise, why say that she shall not have the same advantage that others derive from uniting their capital and skill as partners? If she may contract with her husband for his service as an agent in superintending and carrying on her business, of course she may contract with any other person for the same purpose; and if she may do this, it would seem more rational to say that she may also do what experience has shown is generally more profitable and satisfactory in trade, and that is to make a contract with some person who has either skill or capital or both to share in the profits and losses of her business.

It would seem from these and other decisions (and they must be followed by the Federal courts, for they are interpretations given by the highest court in the state to the statutes of the state):

1. That a married woman cannot engage in any kind of trade or business on her own account, unless she have separate property.

2. That if a married woman, not having separate property or means of her own, engage in and carry on business, the profits, if any there be, belong to the husband as the earnings of the wife.

3. That a married woman in Indiana possessed of no sepa-

¹ *Copeland vs. Cunningham*, 81 Indiana, 116.

² *Montgomery vs. Spangle*, Id., 118.

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rate estate, is relieved of none of the disabilities imposed upon her by the common law.

The rule then still being that a married woman cannot contract, and the power to do so being an exception to this rule, and the petition failing to show that Mrs. Goodman was possessed of any separate property or means with which she was carrying on her business, it follows that she cannot be adjudged a bankrupt.

The petition is therefore dismissed.

Consult *in re Kinkead*, Vol. 3 of this Series, 405.—[Reporter.]

AUSTIN E. BURPEE, ASSIGNEE, ETC., vs. FIRST NATIONAL BANK OF JANESVILLE, ET AL.

CIRCUIT COURT. — WESTERN DISTRICT OF WISCONSIN. — SEPTEMBER, 1873.

IN EQUITY.

PLEADINGS IN CHANCERY — PREFERENCES.

1. The Wisconsin code has not changed the pleadings in equity cases.
2. ANSWER—WHEN INSUFFICIENT.—An answer by a defendant denying upon information and belief allegations in the bill concerning which his knowledge, if any, must be direct and personal, is insufficient, and if he had no knowledge it should be so stated directly.
3. Such denials do not raise an issue, and the allegations must be taken as true.
4. These rules apply to a corporation as well as to an individual.
5. MORTGAGEES CHARGEABLE WITH NOTICE OF DEBTOR'S CONDITION.—To set aside a mortgage as a preference void under the bankrupt act, it is not necessary to find that the mortgagees knew the condition of the bankrupt and his intentions. It is sufficient if they had reasonable cause to believe

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him insolvent, and if they had notice of facts sufficient to put them on inquiry they are chargeable with the knowledge which an investigation of the bankrupt's condition would have developed.

6. JUDGMENT CREDITOR'S RIGHTS RELATE BACK.—The fact that the petitioning creditor's claim existed at the time of giving the mortgage only as a liability and not as a *debt* does not change the relation of the parties. The judgment being neither a payment nor satisfaction of the liability, the creditor's rights relate back to the time when the liability first became fixed.

This was a bill by Austin E. Burpee, assignee of Charles W. Hodson against The First National Bank of Janesville and George Barnes, to set aside a mortgage for \$5,000, given by the bankrupt to the bank on the 18th of September, 1871, upon his grist-mill in Janesville, to secure a pre-existing indebtedness to the bank for that amount.

At that time an action was pending in this court, and on the calendar for trial, by the government against these defendants and others, as sureties on a distillery bond for upwards of \$7,000.

In this suit the government recovered a judgment against the defendants on the 25th day of September, for the sum of \$7,116.36, upon which the United States District Attorney, on behalf of the government, filed a petition in bankruptcy against Hodson, upon which he was duly adjudicated a bankrupt, and Burpee, the complainant, elected assignee.

J. C. McKenney, for complainant.

I. C. Sloan, for defendants.

HOPKINS, J.—It is very questionable whether the answer of the defendants filed in this case raises any issue for trial. The answer is confessedly informal, but that may be overlooked on final hearing if it denies the material allegations of the bill in such a manner as to constitute an issue within the established rules of equity pleading. The code has not changed the pleadings in equity cases. In the bill it is charged that

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the only consideration for the note and mortgage sought to be set aside was a pre-existing note, describing it. The answer denies upon "information and belief," the allegation that there was no other consideration than a prior indebtedness of the bankrupt. Such a denial is insufficient and evasive. If any other consideration was given, the defendants knew it, and hence should have denied the allegation in the bill positively; and should also have set up what other consideration was given for the note. This is the equity rule of pleading, and it is also the rule under the code against a corporation as well as a natural person.¹

That denial does not raise an issue; therefore that allegation must be taken as true in deciding this case. The other material allegations in the bill as against the defendants, are not answered much more satisfactorily.

The bill sets up that the bankrupt, when he gave the mortgage, was insolvent, or acting with a view to insolvency. This is denied on "information and belief," and as the defendant might not be presumed to know that allegation, such a denial may be regarded as sufficient.

But it is further alleged in the complaint, and as an essential element of the case, that the defendants, at the time of taking the mortgage, had reasonable cause to believe that the bankrupt when he gave the mortgage was insolvent, or acting in contemplation of insolvency, and in fraud of the bankrupt act. This allegation, instead of being positively denied, as it should have been if not true, is denied upon "information and belief" only, which is simply saying that according to their information and belief they had not reasonable cause to believe the allegation. Such a denial does not meet the charge in the bill. If the defendants did not know anything on that subject, they

¹ *Mills vs. Town of Jefferson*, 20 Wisconsin, 50; *Kittredge vs. Claremont Bank*, 1 Woodbury & Minot, 244; 2 Daniell's Chancery Pleading and Practice, 722 and notes.

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should have said so directly, and if they had no cause to believe the facts alleged, they knew that also, and should have said so. A denial of that allegation in the form adopted by these defendants is, in my judgment, clearly insufficient. It would not be good under the code system of pleading of this state, and is not supported by any rule of equity pleading that has fallen under my observation.

Under no system of pleading is a party permitted to deny an allegation in his adversaries' pleading upon information and belief, when from the very nature of the charge his knowledge, if any, must be direct and personal. All such allegations have to be answered positively, that the party has "no knowledge, information or belief" of the facts set up in the pleading.

The answer amounts to this only, that the defendants had been informed and believed they had not reasonable cause to believe that the bankrupt was insolvent, which cannot be sustained as a proper denial of the allegation in the bill under consideration.¹

But treating the answer as raising an issue upon that question, I think the proof shows that Hodson, the bankrupt, was then insolvent, and that he gave this mortgage to defendants to secure a pre-existing debt owing by him to the defendants, and for the purpose of preferring it to the government of the United States, which was then prosecuting him to obtain a judgment on a bond signed by him as surety for his father, William Hodson, conditioned for the faithful observance of the revenue laws in regard to distilling spirituous liquors. The court was in session when the mortgage was given, and the case of the government against the bankrupt on the calendar for trial, and the bankrupt, just before going to attend the trial, gave this mortgage to the defendants, and at the

¹ 2 Daniell's Chancery Pleading and Practice, 4th American Ed., 723 *et seq.*, and notes.

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same time gave a deed of the property covered by it (which was all his real estate) to his father-in-law.

In view of these facts, there can be no doubt as to the bankrupt's intentions.

The testimony leaves no room to doubt that the bank officers knew the situation of the bankrupt; that he was in a condition of insolvency, if the government obtained judgment; and I am equally satisfied that they took the mortgage to obtain a preference over the judgment of the government, if it obtained one. But to defeat the mortgage of the bank, as void under the bankrupt act, it is not necessary to find that the parties knew the condition of the bankrupt and his intentions; it is enough if the officers had reasonable cause to believe the bankrupt insolvent. And if they had notice of the various acts hereinbefore stated, they were sufficient to put them on inquiry, and they are chargeable with the knowledge which an investigation of the bankrupt's condition would have developed; so there can be no doubt that the mortgage is void, as contravening the provision of the bankrupt act.¹

The defendants' counsel insist that there was no debt in favor of the government, or that whatever claim existed before the judgment in favor of the government was merged in the judgment, and hence the claim of the government, as proven, was not in existence, and that as to that claim the mortgage was good. I do not think this view is correct. The liability existed at the time of giving the mortgage, and the judgment afterwards was neither a payment nor satisfaction of it. There had been a breach of the conditions of the bond signed by defendants before that time, upon the occurrence of which the defendants' liability became fixed, and that liability

¹ *Turf vs. Martin*, 13 Wallace, 40; *Wager vs. Hall*, Vol. 3 of this Series, 28; S. C., U. S. Supreme Court, 16 Wallace, 584.

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has not been released or discharged, and it is the debt within the meaning of the bankrupt act, which is proven.¹

A decree will be entered declaring the mortgage void and requiring defendants to satisfy the same of record, and debarring them from proving their debt against the estate, the bank to pay the costs of this proceeding.

UNITED STATES *vs.* MILWAUKEE & ST. PAUL
RAILWAY COMPANY.

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—SEP-
TEMBER, 1873.

IN EQUITY.

GOVERNMENT AUTHORITY OVER NAVIGABLE WATERS.

1. CONGRESS CAN REGULATE BRIDGES.—Congress has authority to regulate or prohibit the construction of bridges across the Mississippi river.

2. DELEGATED AUTHORITY.—It can also delegate that authority to one of the chiefs of a department.

3. PREVENTION OF BRIDGES—JURISDICTION.—The United States has the right to prevent their construction otherwise than as prescribed by Congress, and the federal courts have jurisdiction for that purpose.

4. The acts of Congress of April 1st and June 4th, 1872, construed.

5. AUTHORITY OF SECRETARY OF WAR.—Under these acts the Secretary of War had the right to determine whether the construction of a bridge at a given point would seriously affect the navigation of the river and to declare that a bridge should not be there built.

¹ *In re Brown*, 3 Bankrupt Register, 145; *In re Vickory*, Id., 171; *In re Crawford*, Id., 171.

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6. JUDICIARY WILL NOT INTERFERE WITH LEGISLATIVE POWER.—This being a legislative power, the judicial department of the Government will not interfere with it.

7. TECHNICAL INFORMALITY.—Though the disapproval of a particular location by the Secretary of War may not be in technical form, it will not therefore be ignored by the court.

This was a suit in equity brought to enjoin the defendant from building a railway bridge across the Mississippi river, in the vicinity of La Crosse.

The bill alleges that the Mississippi river is a navigable, public river; that Congress has assumed control of its protection and improvement, and of the matter of constructing bridges across it at that place; that Congress has conferred certain duties and authority upon the Secretary of War in reference to locating bridges across said river, and has appropriated, from year to year, large sums of money for the protection and improvement of the navigation of the river; that the defendant is engaged in constructing a bridge across said river, which interrupts and obstructs its navigation; that the Secretary of War (being thereto duly authorized by the laws of the United States) has disapproved of the construction of a railway bridge at the place where the defendant is prosecuting said work, and has determined that due regard to the security and convenience of navigation, and to the convenience of access and the wants of other railways crossing said river, will not permit the building of said proposed bridge; that the defendant heretofore located its bridge at the point where it is now engaged in building it, and submitted its location to the decision and approval of the Secretary of War, and that the Secretary of War disapproved of said location; that the building of said bridge by the defendant, is without authority of law, and contrary to the decisions, regulations and determinations, duly made in the premises, of the Secretary of War, and is in direct and flagrant disregard of the statutes of the United States in that behalf made and provided, and that the construction of said bridge will result in

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direct, lasting and irremediable injury to the navigability of said river, to the commerce being conducted thereon and to the works of improvement being there carried on by complainant.

The bill prays for a temporary and also a perpetual injunction.

The complainant's counsel read several affidavits upon the hearing, showing that the defendant was engaged in building the bridge as alleged, and also read a copy of the proceedings of the Secretary of War in reference to the location of the bridge.

The defendant filed its answer, setting up at length the legislation and proceedings of the Secretary of War in reference to the construction of the bridge, and alleging that by virtue of the legislation of the states of Wisconsin and Minnesota, and of the act of Congress of April 1st, 1872, it is authorized to erect and maintain a bridge across the Mississippi river upon the site by it selected. Defendant denies that the work interrupts or obstructs the navigation of the river, and also that the Secretary of War disapproved the location of the bridge made by the defendant. With its answer, the defendant produced numerous affidavits to show that the bridge being built by it would not materially obstruct navigation, and that it would not be more of an obstruction or more injurious to navigation than it would be if located at the foot of Mount Vernon street, the point designated by the Secretary of War.

The acts of Congress touching this matter are "An act to authorize the construction of a bridge across the Mississippi river, at or near the town of Clinton, &c," approved April 1st, 1872,¹ and "An act further regulating the construction of bridges across the Mississippi river," approved June 4th, 1872.

Application for preliminary injunction on bill and affidavits.

W. C. Webb, United States Attorney, *J. C. McKinney*, and *H. S. Orton*, for the United States.

Decision of Secretary of War on subject is conclusive.

¹ 17 U. S. Statutes at Large, 46.

² *Id.*, 215.

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Kendall vs. The United States, 12 Peters, 618; *Decatur vs. Secretary of Navy*, 14 do., 573; *Gaines vs. Thompson*; 7 Wallace, 347; *Secretary vs. McGarrahan*, 9 do., 298; *United States vs. Wright*, 11 do., 648; *United States vs. Adams*, 7 do., 463; *United States vs. Wright*, 11 Wallace, 648; *Works vs. Junction R. R. Co.*, 5 McLean, 427; 39 English Law and Equity, 553; *Wilcox vs. Jackson*, 13 Peters, 498.

Congress has exclusive power to legislate, and when exercised, all parties must conform. *Wilson vs. Blackbird Creek Machine Co.*, 2 Peters, 245; 13 Howard, 578; *United States vs. New Bedford*, 1 Woodbury & Minot, 402; *Gilman vs. Philadelphia*, 3 Wallace, 713; *United States vs. Railroad Bridge Co.*, 6 McLean, 517; *Columbus Insurance Co. vs. Curtenius*, Id., 209; Angel on Watercourses, 555; *Gibbons vs. Ogden*, 9 Wheaton, 1.

The Government has the right to maintain suits in equity for injunction on such cases. *United States vs. City of Duluth*, 1 Dillon, 469.

J. W. Cary and Gregory & Pinney, for defendant.

The United States has no right to authorize bridge. *Wheeling Bridge Case*, 13 Howard, 583; *Gilman vs. Philadelphia*, 3 Wallace, 713. If bridge is not an obstruction in fact, no injunction can issue. The question, therefore, is, will the bridge be a nuisance? *Mississippi & Chicago R. R. Co. vs. Ward*, 2 Black, 485; *Barnes vs. The City of Racine*, 4 Wisconsin, 454. Statute of Wisconsin has conferred right to build bridge, Laws of 1872, Ch. 119, Sec. 10, Sub. 5, and the state of Minnesota has given its consent by special act.

Decision of Secretary not final nor conclusive, *Lindsey, et al. vs. Harves*, 2 Black, 554; *Garland vs. Wynn*, 20 Howard, 6.

DRUMMOND, J.—The bill asks for an injunction in this case, because the defendant has commenced a bridge across the Mississippi river, and a navigable slough of the same, about

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two miles above the city of La Crosse, and has placed materials there which obstruct the navigation.

When the defendant fixed upon that point for the construction of a bridge, the Secretary of War was duly notified, and after hearing the parties fully upon the subject, disapproved of the construction of a bridge there. The Secretary of War decided that a due regard to the security and convenience of navigation, and convenience of access and wants of other railways crossing the river, would not permit the building of a bridge at that place, and therefore disapproved of the same.

The principal question is, whether the Secretary of War had the authority to declare that the bridge should not be built at the point where the defendant proposed to build it, and this depends upon the construction of the acts of Congress of the 1st of April, 1872, and of the 4th of June of the same year, authorizing and regulating the construction of bridges across the Mississippi river.

The Mississippi is a great national highway, the navigation of which is free to all citizens of the United States. If bridges are to be thrown across it, there can be no doubt of the authority of Congress to declare that they should be so constructed as to impede in the least possible degree the navigation of the river; or to say how many shall be constructed; or to prohibit their construction altogether. This authority grows out of the national character of the river, as a great navigable channel of travel and of commerce. It follows from this that Congress can prescribe the place and the manner of construction, so as not to interfere with the navigation, and when Congress has legislated as to the construction of bridges on the Mississippi, within certain limits, and declared the mode of construction, they can only be built in the way pointed out by Congress. Therefore, if any individual or corporation attempts to construct them otherwise, or elsewhere, than Congress has directed, the United States must have the right to prevent it: and there is no doubt that this can be done through the civil process of the courts.

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Then what terms has Congress prescribed for the construction of the bridge proposed to be built by the defendant in this case? They are contained in the acts of Congress already referred to. The first section of the act of April 1, 1872, authorizes the construction of a bridge across the Mississippi river at such point on the river within 15 miles of the town of Clinton, in the state of Iowa, as may accommodate the Chicago, Burlington & Quincy Railway, and its connections on the west side of the river. And this section contains various directions as to the manner in which the bridge is to be constructed; and, also, several provisos, one of which is that it is not to interfere with the bridge already constructed at Clinton; and another is that it shall not be considered such interference provided it is necessary to cross the approaches to that bridge.

The second section of that act also declares still further in what manner the bridge shall be constructed, whether it is to be a draw-bridge or a bridge without a draw, the space between the spans, the width of the draws, and various other matters connected with the bridge. The third section declares that a bridge constructed in the manner pointed out in the previous part of the law shall be a lawful structure, and shall become a post route. The fourth section provides that when a bridge has been constructed in the way pointed out, different railway companies may use the bridge and its fixtures and machinery, upon such terms and conditions as shall be prescribed by the Secretary of War, provided the parties cannot agree among themselves. Then follows the fifth section, which has been so often referred to in the argument. That declares "that the structure herein authorized [obviously referring to the construction of a bridge at a point on the Mississippi river within fifteen miles of the town of Clinton] shall be built and located under and subject to such regulations for the security of navigation of said river as the Secretary of War shall prescribe."

The first section declares where the bridge shall be built,

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and for what purpose. It was to accommodate the Chicago, Burlington & Quincy railway, and its connections on the west side of the river. Undoubtedly the Secretary of War was subject to the conditions contained in the first section—he could not go beyond them. But the fifth section contains a qualification of the terms and conditions in the first section which the Secretary of War was to see should be carried out. They were, that while it was to be constructed for a particular purpose, it should be so constructed that the security of navigation of the river should not be interfered with.

And therefore it became the duty of the Secretary of War, under this fifth section, when the question was presented to him of the construction of a bridge at a particular place, as stated in the first section, to see that it should be so constructed as to preserve the navigation of the river.

That being so, I think we are enabled to construe the remainder of this law. The sixth section authorizes the Muscatine and Western Railroad company to construct and maintain a bridge across the Mississippi river at the city of Muscatine in the state of Iowa. This bridge was to be constructed according to the terms and conditions contained in the previous parts of this law, subject to them in all respects; but of course only so far as the language made the case applicable. As to this, and as to the seventh and eighth sections, that part of the first section which refers to the Clinton bridge would not be applicable.

Then, as to the bridge authorized to be constructed at Muscatine, the fifth section applied to it, and while the section limited the construction of the bridge at Muscatine, still the Secretary must see that it should be so constructed that the navigation should not be impaired or affected.

Then the seventh section, which refers to the construction of a bridge between the counties of Carroll and Whiteside, in the state of Illinois, and the counties of Jackson and Clinton in the state of Iowa, uses this language: "That a bridge shall be constructed and maintained at any point that these com-

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panies may select." And the same language is used in the eighth section, which particularly refers to this defendant, and authorizes the construction of a bridge between the county of La Crosse, in the state of Wisconsin, and the county of Houston, in the state of Minnesota. But in both these sections the construction of the bridge in each case is subject to all the terms and requirements contained in the foregoing sections of the act.

Then the question is, how far the fifth section affects the eighth section, and whether it was intended by the law-makers that, in authorizing the bridge to be constructed between the county of La Crosse, in Wisconsin, and the county of Houston, in Minnesota, the Secretary of War was to determine, as to the construction and the location of the bridge whether the point that they selected would interfere seriously with the navigation of the river, and so had the right to declare that the bridge should not be constructed there.

There is an apparent conflict between this section and the fifth section, provided we construe the word "locate" in the fifth section as meaning what in its popular sense it is supposed to mean, the placing of the bridge at a particular point on the river. But we think that the fifth section must be construed as qualifying the seventh and eighth sections precisely in the same way as it qualified the first section, and that it meant to say, "You can construct your bridges at such points as you may select, subject to the power or authority of the Secretary of War to decide whether that point is such as to seriously affect navigation of the river, and if it does, that he shall have the right to say that the bridge cannot be constructed there."

Congress, as has been said, would undoubtedly have the right to declare where the bridge shall be constructed. Having that right, it can delegate the authority to one of the chiefs of a department, and confer upon him the right, and that we think it has done in this case.

The individual or the corporation constructing a bridge

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has his or its own interest alone to consider in the construction, but the Secretary of War, as representing the United States, has to consider other interests—first, the navigation of the river; secondly, under the act of June 4th, 1872, the convenience of access to the bridge; third, the wants of railways and highways crossing the river.

So that I think that the language as used in the seventh and eighth sections must be considered as qualified by the language contained in the fifth section. And this will appear more manifest from the act of June 4th, 1872. The view I was first inclined to take of that act was that it might be considered as only referring to acts that were subsequently to be passed by Congress, authorizing the construction of bridges. It undoubtedly does so refer, and intended to declare that if Congress should thereafter pass any act authorizing the construction of bridges upon the Mississippi river, the terms and conditions contained in the fifth section of the act of April 1st, 1872, should be considered as applying.

But it is probable that Congress had a still further object in the passage of this last act, inasmuch as the language contained in the seventh and eighth sections of the law of 1872 was general. They intended to make the case so clear in relation to any bridge that might thereafter be constructed as to remove all doubt upon the subject, and therefore said explicitly, that in relation to any bridge thereafter constructed the terms of the fifth section of the act of April should apply. And then the act of June 4 adds this clause to the previous part of the act, "that in locating the bridge the Secretary of War shall have due regard to the security and convenience of navigation, to convenience of access, and to the wants of all railways and highways crossing the river;" rather, I think, as my brother judge has said, adding significance and point to the meaning of the term as used in the fifth section of the act of April, and showing that the Secretary of War must exercise a discretion as to these particular matters in the location of the bridge.

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One of the principal objects was to prevent the multiplicity of bridges, to have as few bridges as possible across this great river, and, therefore, to compel railways and highways which must make the transit of the river, and which were not widely separate, to use one bridge.

Now this is a great power undoubtedly, and affects immense interests, and the defendant feels, with some justice, perhaps, that it has been exercised in derogation of its own peculiar rights and privileges. But that was a matter for Congress to determine. The authority of Congress over the river is manifest. It can exercise it against the interest of particular corporations or localities, and, as it is a legislative power, it is not for the judicial department of the Government to interfere with it.

It is perhaps true that the Secretary of War has only a negative upon the acts of the defendant, as to the construction of a bridge, and that he can only indirectly declare where the bridge shall be constructed. But that he has the right under these laws to say that the bridge shall not be constructed at a given point, because if constructed there it will interfere unnecessarily with the navigation of the river, and that there will not be due regard to the convenience of access, and to the wants of railways and highways crossing the river, we can have no doubt.

It may be difficult for us to understand as a matter of fact, looking upon this river in the light of the evidence, how it is that a bridge cannot be built anywhere else except at the foot of Mount Vernon street, between the counties of La Crosse and Houston, but still that is not a question for our consideration.

On the whole, therefore, we think, for the reasons stated, that it is competent for the United States to come into this court and ask that the defendant shall not be permitted to construct the bridge at the place proposed, because the Secretary of War has indicated his disapprobation of that point. Tech-

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nically, perhaps, his objection is not in such form as it should have been. But his disapprobation is apparent, and cannot be ignored by the court.

The injunction will therefore be ordered.

SAME vs. SAME.

1. The federal courts will not review a decision of the head of the department on a matter referred to him by Congress for determination.

2. CONSTRUCTION OF STATUTES.—In the construction of statutes courts should give to words their ordinary meaning.

3. SECRETARY OF WAR—HIS POWER.—In the act of June 4th, 1872, Congress designed that the Secretary of War should locate the bridge across the Mississippi river, to accommodate all the interests involved.

4. By the fourth section of the act of April 1st, 1872, the Secretary of War had authority to pass upon the location of the bridge, and this court will not review his decision, but will assist in enforcing it.

5. The Secretary having disapproved a location selected by the company, it has no right to construct a bridge at that point.

6. A disapproval by the Secretary is binding, though not expressed in the manner and form required by the act.

7. RAILROAD COMPANY MUST FOLLOW CONDITIONS PRESCRIBED.—Where Congress has prescribed the limitations and conditions upon which a bridge may be constructed, a company has no right to build a bridge otherwise.

8. JURISDICTION.—The Federal Courts have jurisdiction of a suit by the United States to restrain the placing of obstructions in its navigable waters.

HOPKINS, J.—The right of the Government to the injunction applied for is based upon the decision or action of the Secretary of War under the authority conferred on him by section five of the act of April 1st, 1872,¹ and by the act of

¹ 17 U. S. Statutes at Large, 46.

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June 4th, 1872.¹ The extent of that authority is the first question to consider and settle.

It is claimed by the plaintiff that by those acts he was empowered to pass upon the question of the location of the bridge by the company; that the right given to them by the eighth section of the act of April 1st, *supra*, to select the point to build the bridge was subordinate to the judgment of the Secretary of War; that the selection by the railroad company was not final, but subject to the approval or disapproval of that officer.

If this is the true construction of the acts, the power of the court in the premises is greatly restricted, for we think the doctrine is well settled by the United States Supreme Court, in an unbroken series of decisions, that when a matter is referred to one of the heads of the department for his determination which involves the ascertainment of questions of fact in order to a proper exercise of his judgment, that the decision of such officer is conclusive, unless the act conferring the authority, or some other act, authorizes an appeal or review of such decision.²

This court, therefore, is not authorized to review his decision or inquire whether his reasons assigned for it are sufficient, if the acts clothe him with such authority. If such an officer, in the discharge of the duty imposed upon him, makes a mistake, the remedy of the party injured is by appeal to the law-making power, and not to the courts.

The defendant denies that the Secretary was authorized by either of the acts above referred to to pass upon the question of the location of the bridge, and insists that their right to locate the point to build the bridge was absolute, and that the power of the Secretary related only to the manner of constructing, and to the plans of the bridge and the way and manner of

¹ 17 U. S. Statutes at Large, 215.

² *United States vs. Wright*, 11 Wallace, 648.

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"locating" the bridge at such place; that the word "locate" has reference to the position and construction of the bridge at the point selected by the company, and that the Secretary's action in disapproving the location, and his claim to decide that question, were without authority and void; also that the word "locating," used in the act of June 4th, must be held to have been used in the same sense; that the direction to the Secretary in that act, to have regard to the convenience and accessibility of other railroads and highways to the place selected, related to the mode of construction so as to accommodate such interests, but did not allow him to forbid the building of the bridge at such point. This, I think, is too narrow and restricted a meaning to give to the word "locate" as used in these acts.

Courts in the construction of statutes are to give to words their ordinary meaning; to presume that they were used by Congress in their ordinary sense; neither to enlarge nor restrict unduly their signification, and if possible give to every word its full meaning; when that is impossible, to give such construction as best to carry out the intention of the legislature as gathered from the whole act.

To my mind the act of June 4th throws great light upon the meaning of Congress on the subject.

They are charged with the duty of preserving and protecting the free navigation of the Mississippi river. They have exclusive jurisdiction over that subject, and as it has now become necessary in the march of improvement, and to satisfy the demands of commerce, to permit transit across the river by means of bridges, which, however skillfully planned and constructed, do, to some extent, interfere with the free use of the river, it is their duty to limit the number of such bridges as much as possible; and in order to accomplish that purpose, it seems to me that Congress, by the act of June 4th, *supra*, ordained that, in addition to the authority conferred by the fifth section of the act of April 1st, that "in locating any such bridge, the Secretary of War shall have due regard to

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the convenience and security of navigation, to the convenience of access and to the wants of all railways and highways crossing said river." The object of this provision, to my mind, was to require the Secretary of War to have the bridge located so as to accommodate all those interests, and thus prevent the multiplicity of bridges at the same locality.

I cannot conceive of any other purpose for directing the Secretary in the discharge of his duties under the act to have regard to such other interests.

The fourth section of the act of April 1st authorizes the Secretary to prescribe the terms and conditions upon which other railroad companies may use such bridge. Thus the intention of Congress is manifest, that the Secretary of War was clothed with the authority of passing upon the question of locality, and might, as a matter of course, disapprove of any location that should not fulfill the conditions of the act; that therefore he had jurisdiction and authority to pass upon the question whether the place selected by the defendants would fulfill the conditions and requirements of the act, and having decided that it would not, the court cannot review his decision; but must, to the extent of its power, assist in enforcing it when appealed to for that purpose.

It is unnecessary to pass upon the question of the right of the Secretary to locate a bridge; but if he has the authority to reject the location of the defendants, practically as well as logically, such power would spring from his right to negative all selections or locations made by others. But this is perhaps immaterial to the decision of this motion, and it is noticed simply because it was so earnestly pressed upon our attention on this argument.

The Attorney-General, in his opinion read on the argument, holds that the Secretary had not the authority to locate, by which I presume he meant primarily, but had the authority to disapprove of a location selected by the company, and that when he does so, the bridge cannot be constructed by the

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company at such point. That construction is in accordance with my interpretation of the law.

The defendant has made a very strong case in the affidavits read on this motion upon the merits of the case, and has shown by affidavits of men skilled in the navigation of the river, and in the construction of railroad bridges over navigable waters, that this location is less injurious to the navigation of the river than the one indicated by the Secretary of War; and that it is equally as convenient and accessible to other railroads and highways. If we were at liberty to pass upon that branch of the case, we should feel compelled to hold so. But, as before stated, we think we are not authorized to consider that question on this motion. In saying this we do not mean to be understood as questioning the correctness of the decision of the Secretary, for he evidently had not this evidence before him when he made his decision, and what we say touching the merits is predicated upon the facts proven before us on this motion.

The question was raised by defendant that the Secretary had not disapproved of the location in the form and manner as required by the act. It may be that his proceedings have not been strictly formal, but we find no difficulty in discovering from the records that he had repeatedly disapproved of the location, and had finally notified the defendants that the matter was fully settled and closed as far as he was concerned, so that the objection is not tenable.

It was also claimed by the counsel for the defendant that they had a right to build a bridge without the authority of Congress. Suppose that to be so in places where Congress have not acted on the subject, I think the right does not exist where Congress have acted and prescribed the limitations and conditions upon which a bridge may be constructed, as they have done in this case.¹

¹ *Wilson vs. Blackbird Creek Manufacturing Company*, 9 Wheaton, 1.

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The objection that the court has not jurisdiction, and that the United States cannot maintain a suit in this court to restrain the placing of obstructions in its navigable waters within this district, and to compel their removal, is not sustained by the authorities, and it is sufficient to say that the right of the Government to proceed in equity by bill in such cases is clear upon principle and authority.

I therefore think that the motion of the plaintiff for the injunction to restrain the defendants from building the bridge across the Mississippi river at the point mentioned should be granted, and an injunction for that purpose will issue in accordance with the prayer of the bill.

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ELIPHALET N. TILLOTSON vs. MAD. C. MUNSON.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—OCTOBER,
1873.

IN EQUITY.

PATENT FILTER WELL.—A claim “in its application as a buried water reservoir in the bottom of a well, a filter, consisting of a perforated cylinder or cylinders, the central space forming a chamber into which the water is filtered, and from which the water supply is drawn,” is not for a new subject matter, because the idea of burying any kind of filter is shown in Mr. Bartlett's patent, and the same kind of filter shown in complainant's patent was previously shown in the Andries patent, and the idea of admitting no air to the interior of the filter, and thereby securing the atmospheric pressure to force the water through the soil into the filter was shown in the drive wells of prior date.

L. L. Coburn, for complainant.

West & Bond, for defendant.

BLODGETT, J.—The bill in this case alleges that on the 3rd day of April, 1866, letters-patent were issued from the Patent Office of the United States to R. H. Dewey and E. N. Tillotson, for an Improved Filter Well; that on the 25th day of October, 1870, said letters-patent were surrendered and re-issued to said E. N. Tillotson and W. E. Tillotson. In the specifications appended to the re-issued patent the patentees say their invention “consists in inserting within the bottom of the well a cylindrical receiver or vessel, closed at both of its ends, and with its sides perforated with a series of small apertures, for forming communication between the inside and outside, so that the water surrounding such vessel, or con-

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tained in the stratum of earth in which it may be placed, can freely pass into the same, while at the same time the entrance of sand, etc., and other debris is entirely prevented, the inside of such vessel or receiver being divided into two or more separate compartments by concentric perforated partition plates, in the outer one of which chambers may be placed charcoal, or other filtering substances, for cleansing the water from all impurities, a pipe being connected with the inner chamber, having upon its upper end, above or near the surface of the ground, a suitable lifting pump for raising the water contained in the same." * * * * Within the outer chamber they placed coarse sand, in the intermediate one charcoal or other suitable filtering substance or substances, so that as the water passes from the well, or ground, into the inner chamber of the receiver to the pump-pipe it would be cleansed of all impurities.

After placing the filter thus constructed in the bottom of the well, the well could be filled up, if desired, so that the filter would be entirely buried, the pipe forming the only communication by which the water could be withdrawn.

The claim is as follows:

"In its application as a buried water reservoir, in the bottom of a well, the filter, consisting of a perforated cylinder or cylinders, the central space forming a chamber into which the water is filtered, and from which the water supply is drawn by an ordinary elevating device as described."

The bill then alleges an infringement of this patent by the defendant and prays an injunction and damages.

The answer denies that Tillotson and Dewey were the original and first inventors of the device described in the original and re-issued letters-patent, and insists that substantially the same thing had been patented and described in letters-patent issued by the government of Belgium to Edward Andries, dated February 9th, 1864, and by letters-patent of the United States, issued to said Edward Andries, dated March 28th, 1865; by letters-patent of the United States to

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J. H. Brunt, dated Nov. 28th, 1865; letters-patent of the United States to J. C. & M. V. Campbell, dated January 9th, 1866; letters-patent of the United States to W. D. Bartlett, dated February 19th, 1856.

The answer also denies that the wells made by defendant infringe upon the patent of the complainants.

Proof has been taken upon both the issues tendered by the answer, and the case was ably argued upon these questions at the hearing.

Upon the question of novelty, the proof shows that on the 19th day of February, 1856, a patent was issued by the United States to W. D. Bartlett, for an improved cistern for wells, the leading feature of which was the construction of a reservoir at the bottom of a well, into which the water could pass and from which it was to be drawn by a pump. Provision was also made for surrounding this reservoir with filtering material through which the water must pass before it entered the reservoir. This reservoir was to be buried or covered up, so that the only communication was by the pump-pipe and an air-pipe, the inventor supposing an air-pipe communicating with the atmosphere necessary to make the pump operative. Here we had, in 1856, the idea of a buried reservoir or receiver, which was also to be made, to a greater or less extent, as the circumstances might require, a filter to purify the water; probably not as perfect a filter as the complainant's, but still a filter surrounding the reservoir from which the water was to be drawn.

By the patents issued to Edward Andries, first by the Belgium government, on the 9th of February, 1864, and secondly in this country on the 28th of March, 1865, a filter is described constructed in all its essential features exactly like complainant's filter; that is to say, with concentric casings of perforated metal around a water chamber and the spaces between those casings filled with gravel, charcoal and other filtering material. It is true that in their re-issued patent complainants are not obliged to have more than one space for filter-

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ing material, but in their original patent they require more than one, so that I cannot deem the re-issued patent any less obnoxious to the charge of want of novelty by reason of their dispensing with one or more spaces for filtering material, the important characteristic being the casing of perforated metal surrounding a water chamber, and outside of that one or more concentric casings and the space or spaces filled with filtering material.

Andries does not suggest the covering up or burial of his filter at the bottom of the well, but Tillotson does not require them to be so treated in order to be used. He simply says that it may be covered up "if desired."

Andries intended his device to be used mainly for the purpose of filtering the water in open wells, rivers, the holds of ships, swamps, etc.

All Dewey and Tillotson have done, is to take an Andries filter and bury it in the bottom of the well, or permit you to bury it "if desired."

Bartlett had conceived the idea of burying a filter in the bottom of the well long before the Andries or Dewey & Tillotson patent, and had placed a full description of his device upon the records of the patent office. After him no one could patent the idea of burying a reservoir in the water stratum.

If complainants or Dewey & Tillotson had invented a new filter to be used as a buried reservoir or filter, they might have had a patent on the new kind of filter, but not on the idea of burying it, for Bartlett had anticipated them on that point.

But it has been strenuously urged by the counsel for the complainants that their buried filter performs a new and different function from that of the Bartlett, because, being buried in the water-bearing stratum, and external air excluded, the atmospheric pressure bearing upon the water in the earth is utilized, and the moment a vacuum is created in the water-chamber by withdrawing the water through the pump, the atmospheric pressure drives the water through the filter into

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the water chamber, while in an open well it would only pass in by the slower process of filtration, or by the pressure of gravitation. And the evidence, by experiments performed in the presence of the court at the hearing, satisfies us that the atmospheric pressure does perform the function claimed in the operation of complainant's well when it is covered or buried. But this is not a feature peculiar to complainant's well. All the drive wells, as they are called,—that is, wells made by forcing a pipe into the earth till the water-bearing stratum is reached, and then drawing the water into the pipe through perforations at or near its lower end,—operate upon precisely the same principle as complainant's well, so far as atmospheric pressure is concerned. The idea of a buried reservoir and filter is Bartlett's; the filter complainants use was invented by Andries; while the simple straight pipe driven into the earth to where water is found utilizes atmospheric pressure to the same extent and upon the same principle as the complainant's buried well. Indeed the aid of atmospheric pressure is invoked by the Andries filter when used in an open well surrounded by water. The moment the action of the pump exhausts the water from the water chamber, the pressure of the atmosphere helps to drive the surrounding water through the filter into the chamber to fill the vacuum. So that I think we may say properly in the light of the evidence there is nothing new in complainant's device.

This view of the case, upon the question of novelty, makes it unnecessary for us to consider the evidence applicable to the issue of infringement.

The bill will therefore be dismissed.

Scammon vs. Kimball, Assignee.

J. YOUNG SCAMMON vs. MARK KIMBALL, Assignee.**CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—SEPTEMBER, 1873.****SET-OFF.**

1. **LOSSES UNDER POLICIES NOT ALLOWABLE AGAINST SUBSCRIPTIONS TO STOCK.**—A claim against an insurance company for loss under its policies cannot be a set-off against an unpaid subscription to its capital stock.

2. **UNPAID SUBSCRIPTION IS A TRUST FUND.**—Though the charter of the company only required the stockholder to pay in a part of his subscription, the balance was in the nature of a trust fund for the creditors of the company.

3. **INSOLVENCY CHANGES THE RULE.**—Though in a solvent company the debts might be considered mutual and the set-off allowed, the fact of insolvency changes the rule.

4. **STOCKHOLDER MUST PAY UP HIS STOCK.**—A stockholder coming into equity for relief should first do equity by making good his share of the capital stock. *Lawrence v. Nelson*, 21 N. Y., 158, approved.

5. **FIDUCIARY DEBTOR.**—Though the Bankrupt Law recognizes rights of set-off, it was not intended to enable one occupying a fiduciary relation to take advantage of the bankruptcy of the company.

6. **SET-OFF—WHEN ALLOWABLE.**—Set-off cannot be allowed except between parties sustaining the simple relation of debtor and creditor, and this principle excludes the case of the treasurer of an insurance company.

This was a bill in equity by Jonathan Young Scammon, against Mark Kimball, assignee of the Mutual Security Insurance Company of Chicago, to set off his claims against the company for losses on policies of insurance, against his liability on unpaid subscriptions to the capital stock of the company, and his indebtedness to the company for money deposited with him, and to enjoin the prosecution of suits at law against him by the assignee. At the time of the fire in Chi-

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cago, on the 8th and 9th of October, 1871, Scammon held several policies of insurance against the company, as indemnity for loss by fire, upon which he sustained losses to the amount of over \$50,000. Its losses in that fire rendered the company insolvent, and it was shortly afterwards put into bankruptcy by its creditors.

The assignee, while admitting the liability of the company, denied that the debt could be set off against the demands of the company, and filed a cross-bill asking for a decree against Scammon for these demands. The claims of the company against Scammon were, *first*, for unpaid subscriptions to the capital stock; and *second*, for money on deposit with him as a private banker. The first claim arose as follows: The charter of the company authorized the subscribers to the stock to pay a small percentage of their subscriptions in money, and to give note or personal security for the remainder, and declared that when \$50,000 of the capital stock was subscribed, and five per cent. paid, and the remainder secured, business could be commenced. The complainant was one of the original subscribers for a considerable amount of the stock and paid in one installment, and gave promissory notes to the company, secured as required, for the remainder. This balance had never been paid in.

The other demand was as follows: From the organization of the company, in 1864, the complainant had been a director and a member of the executive and financial committee, and one of its chief managers. After the stock was subscribed and a portion of it paid, he proposed to take the amount, hold it subject to call, and pay interest at ten per cent. This offer was never distinctly and in form accepted by the board of directors, but the complainant, being a banker at the time, held the money, and interest was credited on the current balances. This was acquiesced in by the directors and by the company for some years. There were other assets which appear at first to have been paid to the treasurer or secretary, and deposited to the credit of the company in the Mechanics'

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National Bank, of which the plaintiff was president. The money in his hands was used as required. In 1868 a further call was made on the stock subscription, and afterwards, what was obtained, as well as other funds, appears to have been deposited in the Mechanics' National Bank to the credit of the company. In 1870, the complainant was elected treasurer, and so continued up to the time of the fire, October 8th and 9th, 1871. In 1870, the complainant objected to paying ten per cent. interest, and after July, 1870, the interest was credited to the company at only eight per cent. After his election as treasurer, the money of the company was permitted to remain in his hands as before, by general acquiescence, and no change was made in the books or reports.

No bond or security was ever given by Mr. Scammon as treasurer, nor was any ever required of him. There was nothing on the books of the company to show that the money was loaned to the complainant, but they contain reports made from time to time, with interest credited. The books, reports, and all the records of the company, returned the money in the hands of the complainant as cash, or cash assets, or cash in bank, and after September, 1869, all money was charged to the treasurer.

At the time of the fire the complainant had in his hands, under the circumstances above mentioned, the sum of \$39,188.33, belonging to the company.

Geo. W. Smith and *Samuel W. Fuller*, for complainant.

The transaction with complainant was a loan to him. The charge for interest and its payment, the method of depositing and calling for moneys, etc., are all of the character which dealings between borrower and lender naturally and usually bear. No trust attached to the moneys in the hands of borrowers. Prior to the year 1870, and to his appointment as treasurer, complainant stood as any other person to the company, competent to contract with it, and to become a borrower of its moneys. The office of treasurer only required him

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to keep the custody of moneys which came to him as treasurer. It did not prevent him from becoming either a debtor or creditor of the company.

The present relations of the complainant and defendant are the result of an agreement made by the company when solvent, and to this agreement all the officers and stockholders of the company were parties. The policy-holders who are now creditors of the company, have received, or are about to receive, the gains which accrued from it, and the complainant should not be excluded from the privileges which belong to a borrower of money having a cross demand.

He holds these moneys under an agreement to pay interest, which fact constituted him a debtor of the company, and gives him the right to make this set-off upon the principles established in the case of *Drake vs. Rollo, Assignee, etc.*, heretofore decided by the court.¹

Williams & Thompson, for assignee.

The evidence of an arrangement or contract was incompetent, having no tendency to establish a contract of loan. Directors, when assembled, must act as a body, and conversation among them is no evidence of their action. *Butler vs. Cornwall Iron Co.*, 22 Connecticut, 335; *Essex Turnpike Co. vs. Collins*, 8 Massachusetts, 292; *Bank of Columbia vs. Patterson's Administrator*, 7 Cranch, 299.

The charter of the company forbids the loan of the capital stock of the company, except upon security. The contract, therefore, which the complainant attempts to establish, is forbidden by law, and is void.

For some general principles applicable to the construction of charters, see *Commonwealth vs. Erie & N. E. R. R. Co.*, 27 Pennsylvania, 339; *Auburn & Cato Plank Road Co. vs. Douglass*, 9 N. Y., 444; *Bank of Augusta vs. Earle*, 13 Peters, 519-587.

¹ Vol. 8 of this Series, 273-300.

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Charters of coporations are strictly construed by the courts, and no powers are held to be granted by them except those expressly given, or such as clearly exist by necessary implication. The mode of using the capital of the company is determined by the charter. If the transactions in reference to the funds of the company amount to a loan to one of the directors, without any security whatever, and without any stipulation as to time, then there was a violation of the charter, the contract was void, and the fund was still the fund of the company, in the hands of a director, not invested by contract of loan or otherwise.

Directors of corporations are agents and trustees, and their contracts with the corporation are regarded with disfavor, and scrutinized with jealousy and suspicion. The strictest proof of the fact of the contract, and of its fairness and justice, is required. The fund which was taken by the complainant was a trust fund for the payment of the debts of the company. It was charged with this trust before it was taken, and it could not be divested of it by the manipulations of the complainant. *Curran vs. State of Arkansas*, 15 Howard, 304; *Wood vs. Dummer*, 3 Mason, 308; *Vose vs. Grant*, 15 Massachusetts, 505; *Spear vs. Grant*, 16 do., 9; *Nathan vs. Whitlock*, 3 Edwards' Chancery, 228; S. C., 9 Paige, 151; *Richards vs. New Hampshire Insurance Co.*, 43 New Hampshire, 263; *Koehler vs. Black River Falls Iron Co.*, 2 Black, 715; *Robinson vs. Smith*, 3 Paige, 222; *Charitable Corporation vs. Sutton*, 2 Atkyns, 400.

When it was reported to the stockholders and to the public that these funds were "in hand" or "in bank," the stockholders and the public had a right to assume and believe that so much, at least, of the company's assets were available for the payment of liabilities without set-off, defalcation or discount of any kind; and when they are sought to be charged with a set-off by one of the largest creditors, and one occupying the most intimate relations to the company, the transac-

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tions by which such a state of things is brought about, are, in law, fraudulent, and cannot be sustained.

One holding a position of trust cannot use it to promote his individual interests by buying, selling, or in any way disposing of the trust property. *Butts vs. Wood*, 37 New York, 317; *Coleman vs. Second Avenue R. R.*, 38 do., 201.

One occupying the double relation of manager and creditor of a bank, cannot bind the bank by any act of his concerning his own funds. *Clafin vs. Farmers and Citizens Bank, of Long Island*, 25 New York, 293.

As to the effect of the relation of a director to the corporation upon contracts made by him with his company, see *Stacy vs. State Bank of Illinois*, 4 Scammon, 91; *Benson vs. Hearthorn*, 1 Young & Collyer, 326.

A treasurer is a trustee in the strictest sense of the term, and trustees cannot borrow the trust funds. Perry on Trusts, § 453, and cases cited in Note 9; *Ex parte Lacey*, 6 Vesey, Jr., 626; *Pocock vs. Redington*, 5 do., 794.

George W. Smith, in reply: The power of the directors was limited only by their discretion in the performance of their duties. Session Laws of Illinois for 1853, p. 394, § 4.

The non-recorded acts of a corporation may be proved by parol, and it may be bound by an implied contract, provided such act is within the scope of its authority. Abbott's Digest of Corporations, 223 and 281; *Maher vs. City of Chicago*, 38 Illinois, 266; *Langedale vs. Bouton*, 12 Indiana, 467.

The company had power to make this contract. "The capital stock may be loaned upon promissory notes or bills of exchange, or otherwise, not having more than twelve months to run." Session Laws of 1853, p. 396, § 13.

That the evidence of indebtedness in the form of a note is wanting, is not material, the essential thing being the personal responsibility of the borrower. The account kept by the company with the complainant was a sufficient compliance

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with the law, and, further, the words "or otherwise," warranted a lending in the manner now in question.

Directors are not, by reason of their office, incapacitated from dealing with the corporation as individuals. The same rules apply here that apply to trustees purchasing of the *cestui que trust*.

And the trustee may purchase from the *cestui que trust*, provided there is a distinct and definite contract, and one in which there is no fraud and no advantage taken. *Beeson vs. Beeson*, 9 Pennsylvania State, 280; *Davoue vs. Fanning*, 2 Johnson's Chancery, 252.

None of the cases cited by the defendant on this point militate against the position assumed by complainant.

The stockholders repeatedly applied the interest moneys derived under this contract, as dividends upon the stock notes, and recognized the agreement in every way in which it was possible to do so.

The case of *Drake vs. Rollo, assignee*, etc., recognized the equitable claim of the complainants in that case, although one of them was at the time the chief officer of the company. His appointment as treasurer made no change in law in the position of the complainant under the contract, as it made none in fact.

If there were any disabilities resting upon complainant, the stockholders might, and did, waive them.

DRUMMOND, J.—The first question is, whether the plaintiff has the right to set off his losses under policies of the company against his subscription to the stock. In one sense, what the plaintiff owes the company on his stock is a debt due the company. What the company owes the plaintiff on his policies of insurance, is a debt due the plaintiff. The debts are mutual, in that they exist from one to the other reciprocally. And if the debt due from the plaintiff were an ordinary debt, then, as we have already decided in the case of *Drake vs. Rollo, assignee*, the set-off would be allowed,

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although the result would be to pay the plaintiff his claim against the company in preference to other creditors. We are to apply the bankrupt law to the law of the state creating the corporation. The charter authorized the company to commence business on the payment of five per cent. of the amount subscribed, provided the payment of the remainder of the stock was secured.

The purpose of this was to accommodate the stockholders, by permitting secured promises to pay to stand in the place of the money. It was still intended as a fund to protect the creditors of the company, and the charter pointed out the special manner in which the fund should be made available in case of necessity, and which has been followed in this case. So long as the company was solvent, there might not be any serious objection to the stockholder insisting that his loss on a policy should be an answer to a call to pay his subscription to the stock, because if he were to pay his subscription, the company would be obliged immediately to refund to the extent of the loss. In that case no one is injured by the allowance of the set-off. But where the company is bankrupt, it is different. Some one must sustain a loss, and the question is, whether the stockholder who has not paid his stock subscription, and who happens to have a policy on which the company is liable, shall bear his share of the loss, or shall be paid in full to the extent of his subscription. Does the fact of the solvency or bankruptcy make no change in the rule? We think it does, and that there is a difference in principle between the two cases. We have the right to judge of causes from their effects, and to reason accordingly, and certainly we ought not to sanction a rule which produces so much loss to the general creditors of the company, unless by following a different course we trench upon some settled principles of law or equity. Where a party borrows from the capital of the company, takes out a policy, sustains a loss, and in case of insolvency and bankruptcy, claims to set it off, we allow the set-off because he is an ordinary debtor of the company, and

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therefore comes within the rule that one debt answers another, however hard it may occasionally be, and doubtful on general principles of ethics. But in this case the plaintiff is not an ordinary debtor of the company. The charter has permitted him to retain a part of the capital of the company, and hold it in trust for the creditors. And, it seems to us, that to allow him, under the circumstances of the case, to pay himself in the way he seeks for his losses under the policies, would enable him to take advantage of his fiduciary relations, and obtain a preference over other creditors, not warranted by the equitable principles of the bankrupt law, and contrary to the manifest intent of the charter of the company.

In a court of equity, as a set-off may be allowed which is not sustainable at law, so we suppose, though generally equity follows the law, there may be a set-off, technically good at law, which, owing to the relations of the parties, may not be admissible in equity. In this case the plaintiff comes into a court of equity for relief, and we think he should first do equity by making good his share of the capital stock, on the strength of which the company obtained its credit, and was enabled to start in business. This has become equity, because he is in one sense a trustee of that fund, and because, further, the company is insolvent and in bankruptcy.

Some very late English authorities were cited by the plaintiff's counsel, which it is insisted, are decisive of this case in favor of the set-off.

The first was *In re Duckworth*, 2 Law Reports (Chancery Appeal Cases) 578, (1866-7.) It is difficult to comprehend this case fully without a re-examination of the various statutes referred to. The party had subscribed for certain shares of stock in a company; he was also a creditor. The company was wound up under a special statute. Afterwards the party made an assignment for the benefit of his creditors, which was registered in bankruptcy. The question was between the representative of the company, under the winding-up act, and the trustees, under the bankruptcy registration, as to the

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right of the latter to set-off the debt from the company to the party, against calls for the subscription, and the court held that the set-off was allowable, on the ground apparently that the case was one of ordinary mutual debts, and so within the the statute in bankruptcy as to set-off. It was admitted that if the court of chancery, as such, had been adjudicating the case, the set-off would not be allowed, because the true construction of the winding-up act cut it off.

But treating it as a court of bankruptcy, and not as a court of equity, and independent of the differences between that case and this, the reasoning of the court is not very satisfactory. The judge merely says, that it is his opinion that there would be a set-off under a particular section of the statute.

The other case is *In re Universal Banking Corporation*, 5 Law Reports (Chancery Appeals), 492, (1869-'70), and is similar to the first and relies upon it.

So far as these cases show that a subscriber to the stock of a company may set off a demand due from the company against his subscription, under the circumstances set forth, there may be certain analogies between those cases and this, though the debts are treated throughout as ordinary debts, and no consideration seems to have been given to any relation of trust existing between the parties. And besides, as already intimated, there are various statutes referred to, which may have more or less affected the views of the court. The winding-up act seems to concede that the principle of set-off, in case of contribution, is wrong, as it prohibits it.

These cases were both decided after the passage of our bankrupt law, and therefore could not have entered into the consideration of the law makers. But there are some decisions in this country which do not agree with the principle of those late English cases.

It seemed to be admitted by the counsel for the plaintiff, that in the case of mutual companies, so-called, the rule did not apply of allowing set-off. One case may be referred to

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—*Lawrence vs. Nelson*, 21 New York R., 158—where the party had given what is termed a “premium note,” and had sustained a loss—one a debt due him from the company, the other by him to the company—and he sought to set off his claim on the policy against his premium note, and the court held that this could not be done in that case, because the note constituted a part of the capital of the company, and in case of insolvency to suffer it to be done would be giving one creditor an unfair advantage over another.

The bankrupt in that case was called a mutual company, though technically a stock company, but we are somewhat at a loss to understand the alleged difference between the two cases; it is true we can call one a joint stock company and the other a mutual company, but names do not change things. In both the “bills payable” constitute a part of the capital of the company, and a trust fund for the benefit of creditors. In both the party owing the bills receivable has met with a loss on a policy of the company. The difference, if any, seems to be in favor of the premium note as claiming a set-off, because that is given for the policy, and by a species of arrangement stands indirectly as a part of the capital, whereas here the bills receivable have to be treated directly as a part of the capital and were given with that special purpose.

It seems to us that the argument of the court in the case of *Lawrence vs. Nelson* applies to this case.

It is said that the bankrupt law has not taken away any of the rights of set-off, but has recognized and enforced them. That is so, but the bankrupt law was not intended to encourage anything inequitable, or to enable one to take advantage of the bankruptcy of an individual or of a company, to obtain payment in full, while others could only have a pittance, and especially when those seeking the advantage occupied relations of trust.

It follows, from what we have said, that we are of the opinion that the plaintiff has not the right in equity to set

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off his losses on the policies against his liabilities for the payment of the stock of the company. We think that the obligation of every person who subscribes and owes for stock in such a company as this, is, in case of its insolvency, to pay what he owes for the benefit of the creditors.

The other question is as to the equitable right of set-off of the claims under the policies against the funds which the plaintiff held as the treasurer of the company.

Here the position of the plaintiff was unquestionably that of trustee. The only point is, whether that was changed by the contract, or, rather, understanding of the parties. It may be admitted that the fair inference is that the plaintiff had the right to use the money, because the payment of interest implies that; but it is impossible to consider this part of the case fairly, without bearing in mind the peculiar relations of the parties to each other. If the plaintiff had authority to employ the funds, as treasurer, he was obliged to have them always ready to answer the necessities of the company. He was still, as to them, a trustee, and not an ordinary debtor of the company. It was the case of a trustee using trust funds with the consent of the *cestui que trust*, but always on the condition that they were to be so used that he could meet the object of the trust.

The evidence shows that at the time of the fire the plaintiff had in his hands the funds of the company. It was as treasurer. Having met with losses on his policies, he claims the right, so to speak, of sequestering the funds in his hands as treasurer to answer his losses as a general creditor of the company. If we concede that this may be permissible in case of an ordinary debtor, we think it would not apply to one occupying the situation of this plaintiff. He would be receiving the obligations of the company upon different terms from an ordinary policy-holder, and he would occupy a vantage ground over others.

There are several difficulties in the way of a set-off on the special facts of the case. The plaintiff was elected treasurer

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in 1870. Whatever arrangement was made, if at all, was prior to that time. The most that can be said is that after he was elected treasurer, the funds in his hands, while they were, from time to time, reported as cash or capital, drew interest, which was accounted for, and this with the acquiescence of those who may be presumed to represent the company. There was no distinct contract made with him while he was treasurer which would constitute him the debtor, and nothing more, of the company.

The plaintiff was not only the banker of the company, but its treasurer, considered as sustaining those relations to the company pertaining to the office. It is very clear that whatever may have been the view of the plaintiff, the directors and the company did not regard the plaintiff as the mere borrower of the funds in his hands, and before a set-off would be admissible as between the company and its treasurer, in case of the insolvency or bankruptcy of the former, there ought to be satisfactory evidence that he, as to the money, had taken the position of an outside party; in other words, that he had, as to the money, ceased to be the treasurer of the company.

We need not refer to the question, whether if it was a loan to the treasurer by the directors, it was a violation of law, and therefore invalid. We prefer to place it on the ground that under some of the conceded facts of the case, the set-off is not maintainable, unless there is established the simple relation of debtor and creditor. This, we think has not been done, and therefore we overrule the claim of set-off.

The original bill will be dismissed, and a decree will be rendered for the assignee on the cross-bill for \$54,145.90, the amount due on both demands.

As to the right of set-off in cases where assured of an insolvent insurance company are debtors of the corporation, see *Drake vs. Rollo, Assignee, etc.*, Vol. 3 of this Series, 273; *Hitchcock vs. Same, Id.*, 276; *Sanoy vs. Hong, Assignee, Id.*, 293; S. C., affirmed by U. S. Supreme Court in 17 Wallace, 610. This last case is closely allied to the text. Consult *Weston v. Barker*, 13 Johnson, 270.—[Reporter.

Sargent Manufacturing Co. vs. Woodruff.

THE SARGENT MANUFACTURING COMPANY vs.
HENRY S. WOODRUFF, ET AL.

CIRCUIT COURT.—WESTERN DISTRICT OF WISCONSIN.—OCTOBER, 1873.

IN EQUITY.

1. PATENTS—PRELIMINARY INJUNCTION.—The ruling of a Federal Court in one circuit on a motion in a patent case is not a sufficient decision upon the merits to warrant another court in issuing a preliminary injunction where the infringement is positively denied.

2. PRESUMPTION FROM ISSUANCE OF LETTERS-PATENT.—Where the defendant is manufacturing under letters-patent, the presumption is that he is not infringing, and unless the court can see, from an inspection alone of the patent, that it is an infringement, the court will not issue an injunction until after a full hearing.

This was a bill for an injunction to restrain the defendants from infringing letters-patent for an improved buckle, granted to A. H. Cole, October 10, 1865, and of letters-patent for an improvement in buckles, re-issued to one John W. Mashmyer, assignee of Samuel S. Sargent, dated the 13th day of April, 1873.

E. W. Stoughton, for complainant.

J. A. B. Cassoday, for defendant Woodruff.

HOPKINS, J.—The complainant moves for a preliminary injunction on the bill and affidavits in support thereof. The defendant Woodruff has answered, and presented and read with his answer, in opposition to the motion, divers affidavits of parties skilled in the business, to the effect that the

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buckle manufactured and sold by him is not an infringement of the complainant's patents above mentioned or either of them. The defendant also sets up in his answer that on the 9th day of January, 1872, he obtained letters-patent for an improved buckle, under which he is manufacturing and selling the buckles complained of. His buckle is known in the trade as the "Champion" buckle, and has met with very general approval and is extensively used. On the argument the complainant's counsel based the right to an injunction principally upon the Cole patent, which buckle is known commonly by the trade as the "Cole Wedge" buckle. The complainant sets out in his bill that in a case pending and tried in the Circuit Court for the Northern District of New York, before Judge Woodruff, brought by one William L. Starr, deceased, against Frazer and Burns, the validity of the complainant's patents was established, and an injunction was therein granted restraining those defendants from manufacturing and selling a buckle known as the "Eureka" buckle, which was the invention alleged in that case to infringe upon the Cole Wedge patent buckle, and that a decree was entered therein perpetually enjoining those defendants from the manufacture and sale of the Eureka buckle; that the defendants in that suit then refrained from manufacturing the Eureka, but continued to manufacture the Champion under an agreement with this defendant; that afterwards an application was made to that court, Judge Woodruff presiding, for an attachment against the defendants therein for violating the injunction in manufacturing and selling the Champion buckle, and that after hearing the parties on that motion the court adjudged the defendants guilty, holding that the Champion infringed upon the Cole Wedge patent. It does not appear, nor is it alleged, that the question of infringement involved in this suit has ever been tried in any other manner than on that motion. The papers in this case show that at the trial of that case the defendants therein were manufacturing the Champion as well as the Eureka, notwithstanding which, however, there

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was no charge or claim then made, that this defendant's invention, the Champion buckle, was an infringement of the Cole Wedge buckle. If that court had tried the question of infringement involved in this suit, in the usual and formal mode of trying such questions, I should regard the decree as sufficient, *prima facie*, to authorize the granting of the preliminary injunction prayed for herein. For after one fair trial of the question on its merits in one court, other courts should presume the decision to be right, and follow it, so far, at least, as to restrain all parties preliminarily from manufacturing or selling the illegal or piratical article in another suit, founded upon the same right and involving the same question. But I do not think the decision of the learned judge on that motion sufficient to warrant another court, in a suit where the infringement is positively denied, in granting a preliminary injunction without reference to the facts proven in the case before it.

The defendant's counsel contended, with a good deal of force and reason, that the plaintiff therein, the assignee of the Cole Wedge patent, did not then consider the Champion as an infringement of the Cole patent, for if he had he would have raised the question on the trial, as the defendants therein were manufacturing the Champion at that time, as well as the Eureka. This position of the defendants is not easily answered. It, at least, tends to show that the infringement is not so manifest as the complainant's counsel now pronounce it. I cannot, therefore, regard the decision of his Honor, Judge Woodruff, as conclusive, or as sufficient authority upon the question of infringement, without reference to the facts appearing on this motion, to grant the injunction asked for, but must look into the motion papers and see how the question appears from them. In examining this question it must be borne in mind that the defendants are not pirating upon the rights of the complainant. They have obtained and are acting under letters-patent from the proper authority, and the same presumption follows from their

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letters as from the complainant's. The presumption is that the buckle is not an infringement, and a party acting in good faith under such letters-patent is entitled, on an application of this character, to claim with great force the presumption springing from the issuance of the letters. This consideration on the final hearing may not be entitled to as great weight as now, for it is clear that the decision of the commissioners of patents is not conclusive or binding upon the courts. They may annul and vacate a patent unquestionably, but until the claimant has had a full and fair opportunity to try that question of fact before a court, he should not be enjoined, unless an inspection alone of the invention should most clearly convince the court of the infringement. This is the well-settled doctrine of the courts on this question.

Winans vs. Eaton, 1 Fisher R., 181; *Parker vs. Sears*, Id., 93; *Goodyear vs. Dunbar*, Id., 472; *American Nicholson Pavement Co. vs. City of Elizabeth*, 4 Fisher, 189. In the latter case Justice Strong, who delivered the opinion of the court, says: "The grant of the letters-patent was virtually a decision of the patent office that there is a substantial difference between the inventions. It raises the presumption, that, according to the claims of the latter patentees, this invention is not an infringement of the earlier patent. This presumption, although it may be overcome, is not to be disregarded in considering a motion for a preliminary injunction." The granting of an injunction in patent cases is discretionary as in other equity cases; and where the equity of the bill is fully denied it is not usual to grant one. In this case the fact of infringement is fully denied by defendant's answer under oath, and in support of which he has filed the affidavits of eleven persons, who profess to be skilled in such matters, to the effect that the Champion is not an infringement of either the Cole Wedge or Mashmyer patents. The respective parties have also presented to the court their several letters-patent, and specimens of their buckles, and have made various experiments, to test the quality and

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operation of each, the one to show their identity and the other their dissimilarity, from which I do not see the infringement sufficiently clear to warrant me in granting the complainant's motion. I think it better to let the parties continue to manufacture their respective articles at their peril until the question can be determined upon evidence taken in the ordinary way, rather than to express any decisive opinion upon the question at this time, based upon the *ex-parte* affidavits of the parties themselves and of other witnesses, claimed to be interested in this matter.

The motion is therefore denied.

Preliminary injunctions are addressed to the discretion of the court, and in cases of new patents will not ordinarily be granted until the patent has been established by an action at law. But if it has been in long use, "which may fairly create the presumption of an exclusive right, the court will in such a case ordinarily interfere by preliminary injunction." 2 Story's Equity Jurisprudence, § 934; *Goodyear vs. Day*, 2 Wallace, Jr., 283.—[Reporter.

The Tug May.

THE TUG MAY.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—OCTOBER, 1873.

A libel of information against a steam vessel, to recover the penalty for not being inspected according to the Act of Congress to provide for the better security of life on board of vessels propelled in whole or in part by steam, cannot be sustained, if a subsisting seizure of the vessel at the time the libel is brought is not alleged, and which is to be proven at the hearing.

The libel of information, brought by the District Attorney in this case, charges that the steam tug May had been employed in towing lumber on the Oconto river into Green Bay in this state, without having been inspected in conformity with the eleventh section of the act of Congress, entitled, "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes,"¹ and that by reason thereof the owner or owners and master of said steam tug became liable to pay to the United States the sum of five hundred dollars; that for the payment of said sum of five hundred dollars, the said steam tug became liable to be seized and proceeded against summarily by way of libel, and for the recovery of which this civil and maritime action is instituted.

The objection to the prosecution of this libel of information was the omission of an allegation of a seizure.

The first section of the act under which the libel of information is brought provides, that "if any such vessel, 'propelled in whole or in part by steam,' shall be navigated without complying with the terms of the act, the owner or owners

¹ 16 United States Statutes at Large, 440, approved Feb. 23, 1871

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thereof shall forfeit and pay to the United States the sum of five hundred dollars for each offense, one half for the use of the informer, and for which sum the steamboat or vessel so engaged shall be liable and may be seized and proceeded against by way of libel."

Levi Hubbell, U. S. District Attorney, for the United States.

Finches, Lynde & Miller, for respondents.

MILLER, J.—By a long course of judicial decisions, it must be regarded as definitely settled that there must be in all cases under the revenue and navigation laws a subsisting seizure at the time the libel or information is brought. See Conkling's Treatise, 252, 3, 4, 5, and cases cited, and many others.¹ These decisions are pursuant to section nine of the act to establish the judicial courts of the United States, approved September 24, 1789,² investing the district courts with exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where seizures are made on waters navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas. By the section under which this libel is brought it will be observed that the owner of the vessel shall forfeit and pay the penalty, and for the recovery thereof the vessel shall be liable and may be seized and proceeded against by way of libel. The remedy here prescribed for a breach of the law is by seizure and libel.

This libel of information cannot be further prosecuted unless it be amended by alleging a seizure by the proper officer, and which must be proven as alleged.

On appeal to the Circuit Court, Judge Drummond affirmed above case.

¹ See Conklin's Practice, 4th edition, 231.

² 1 U. S. Statutes at Large, 73, 76.

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Opinion delivered October term, 1874, reported in 7 Chicago Legal News 187, to be reported in subsequent volume of this Series.

The present statute for the regulation of steam vessels comprises Title LII of the revision of 1874, p. 857. The section of that act providing for the penalty is as follows, § 4499:

"If any vessel, propelled in whole or in part by steam, be navigated without complying with the terms of this Title, the owner shall be liable to the United States in a penalty of five hundred dollars for each offense, one-half for the use of the informer, for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense."—[Reporter.

NATHANIEL S. DONALDSON, ASSIGNEE, ETC., VS.
JOHN V. FARWELL, ET AL.

CIRCUIT COURT. — EASTERN DISTRICT OF WISCONSIN. — OCTOBER, 1873.

1. FRAUDULENT PURCHASE BY BANKRUPT — WHEN VENDOR MAY RECOVER GOODS FROM ASSIGNEE. — A purchase of goods on credit by an insolvent man, with the intention of using their proceeds to pay other creditors, and never meaning or expecting to pay for them, is fraudulent, and the vendor has the right to recover them, even as against the assignee in bankruptcy, if he can identify the goods, and exercises his right of reclamation within a reasonable time.

2. TITLE IS DEFEASIBLE. — Such a sale does not pass to the purchaser an absolute title, but only one defeasible at the option of the vendor.

3. Though the assignee holds the bankrupt's estate under a stronger right in many cases than the bankrupt himself could, he does not so hold it as to divest the right of reclaiming goods thus obtained by fraud.

This was an action of trover by Nathaniel Donaldson, assignee of Emanuel Mann, bankrupt, against John V. Farwell and his partners, to recover the value of certain goods

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sold by them to the bankrupt and afterwards reclaimed by them.

The bankrupt was, during the early part of 1872, a merchant in Richfield, near Milwaukee, Wisconsin, and on the 4th, 5th, and 17th days of April, 1872, purchased through his son, Washington L. Mann, of the defendants, merchants in Chicago, a bill of goods amounting to \$5,073.49. At the time of this sale, Mann, the bankrupt, was largely indebted and insolvent, and his son made these purchases, which were on the ordinary terms of credit, with the knowledge that his father intended to convert the goods into cash, and use the money in paying certain farmers to whom he was indebted, and that he had not the means and did not expect to be able to pay for the goods. The son ordered the goods shipped, not to Richfield, but to Milwaukee, giving as a reason that they could be hauled from there by teams.

On the 24th of May following, Mann filed his petition in bankruptcy in the District Court for this district, and was duly adjudicated a bankrupt, and the plaintiff elected his assignée.

The defendants knew nothing of Mann's insolvency, nor of the bankruptcy proceedings, until the 5th of June, when they took immediate steps to recover the goods, on the ground of fraud in their purchase, and on the 7th of June retook \$3,500 worth of them from the warehouse where they were stored, and before they had come to the possession of the assignee. The balance the assignee allowed Farwell then to remove, they giving bond satisfactory to the District Court to pay the assignee the value of the whole in case they were defeated in the action.

The case was first tried in October, 1872.

Finches, Lynde & Miller, for plaintiff.

1. The 14th section of the bankrupt law declares that the assignee shall be vested with the title which the bankrupt had at the commencement of the proceedings in bankruptcy.

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2. Mann had the legal title to the goods at the date of the commencement of the proceedings in bankruptcy. He had such a title that he could have made a *bona fide* sale of all the goods purchased from Farwell, to a third party.

3. No attempt was made by Farwell & Co. to rescind the contract of sale until after the assignee was appointed. It was then too late for Farwell & Co. to re-invest themselves with the title. The title, by force of the bankrupt law, had become vested in the assignee before any step was taken by Farwell & Co. to rescind the contract.

4. An assignee in bankruptcy, by the provisions of the bankrupt law, takes an entirely different interest from an assignee under a voluntary assignment. *In re Joslyn*, 2 Bissell, 235; *Ex parte Hinds*, 1d., 91.

Mariner, Smith & Ordway, for defendants.

1. The purchase of goods upon credit with intent not to pay for them is a fraud which renders the sale *void at the election of the vendor*, as against the vendee and all others having no better title than such vendee. It is true that the title vests in the vendee, but it is a voidable title. *Load vs. Green*, 15 Meeson and Welsby, 216; *Ash and Annors vs. Putnam*, 1 Hill, 302; *Cary vs. Hotailing*, 1 Hill, 311; *Dow vs. Sanborn*, 3 Allen, 181; *Nichols vs. Michael*, 23 New York, 264; *Hennequin vs. Naylor*, 24 New York, 139; *Seligman vs. Kalkman*, 8 California, 207; *Bowen vs. Schuller*, 41 Illinois, 192; *Bidault vs. Wales*, 19 Missouri, 36; Kerr on Fraud and Mistake, 110; *Conyers vs. Ennis*, 2 Mason, 236.

2. In order to establish fraud in the purchase of goods, it is not necessary that the purchaser should have made false statements concerning his pecuniary ability, by which the credit was obtained. The fraud consists in the purchase with intent not to pay, and this intent may be proved by facts and circumstances as well as by the affirmative declarations of the purchaser. *Johnson vs. Monell*, 41 New York, (2 Keyes) 655;

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Brown vs. Montgomery, 20 New York, 287; *Durell vs. Haley*, 1 Paige, 492; *Seligman vs. Kalkman*, 8 California, 207; *Bidault vs. Wales*, 19 Missouri, 36; *Bowen vs. Schuler*, 41 Illinois, 192; *Bullock vs. Narrott*, 49 Illinois, 62; *Byrd vs. Hall*, (2 Keyes) 646.

3. A fraudulent suppression of the fact of insolvency is alone sufficient to avoid the sale. *Johnson vs. Monell*, 41 New York, (2 Keyes) 655; *Durell vs. Haley*, 1 Paige, 492; *Powell vs. Bradlee*, 9 Gill and Johnson, 220; *Hennequin vs. Naylor*, 24 New York, 139; *Seligman vs. Kalkman*, 8 California, 207; *Bidault vs. Wales*, 19 Missouri, 36.

4. The fraudulent intent may be found from acts of the purchaser after the sale. *Bowen vs. Schuler*, 41 Illinois, 192, and cases above.

5. The vendor may disaffirm the sale for fraud within a reasonable time after discovery thereof, and what is a reasonable time will depend upon the circumstances of each case. As a general rule, as against the vendee, and all who have no better title, he may elect to rescind so long as he has done nothing to affirm the sale after knowledge of the fraud. An execution creditor, a common-law assignee, one holding as collateral security merely, has no better title than had the fraudulent vendee. As to this there is no dispute, but our sixth proposition is disputed, and thereupon arises the principal difficulty in this case.

6. We maintain that an assignee in bankruptcy is not a purchaser for value, that he stands like a common-law assignee, in the bankrupt's shoes, and that the defrauded vendor may rescind, even after the goods have come to the possession of the assignee in bankruptcy, as in this case part of the property had, and that the right to rescind is not cut off by the adjudication of bankruptcy and appointment of an assignee. We claim that under such circumstances the defrauded vendor can reclaim his goods whenever he can identify them, or any of them, in the possession of the assignee, and until they have gone to a *bona fide* holder for value, exactly the same as at common law, and as a necessary result of this that

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he can claim of the assignee the proceeds of such goods which he may have sold, until in the regular course of executing his trust he has paid over and distributed the same among the creditors of the bankrupt. Such is the law as to common-law assignees, and we see no difference in principle between the two cases.

The plaintiff's counsel combat this proposition vigorously, their main reason being the inconvenience which will be introduced by such a rule into the administering the effects of bankrupts.

Section 14 of the bankrupt act vests in the assignee "all the estate, real and personal, of the bankrupt * * * and all * * * right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same as the bankrupt might or could have had if no assignment had been made, * * * And he may sue for and recover the said estate, debts and effects * * * in the same manner and with like effect as they might have been prosecuted or defended by such bankrupt."

So far the assignee represents the bankrupt, but beyond this by the same section he is made to represent the creditors of the bankrupt, and is given greater rights than had the bankrupt. "All the property conveyed by the bankrupt in fraud of his creditors * * * shall in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee."

By this section just what the bankrupt had, no more, is vested in the assignee, by this we understand, all the property, rights, and equities of the bankrupt, which in law or equity belonged to his creditors — no more, no less, not the estate or property of others.

The bankrupt law of 1841 was not materially different from that of 1867, both substantially like the English bankrupt act of 6 Geo., IV, chapter 16, section, 63. Under both these statutes there are decisions which we submit fully and fairly rule this case.

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The decisions in Massachusetts under their insolvent law are also the same. *Pratt v. Wheeler*, 6 Gray, 520. Under the bankrupt act of 1841 there are four cases, all reported in 2 Story's Reports, giving the same construction for which we contend. *Ex parte Newhall*, 2 Story, 362; *Winsor v. McLellan*, Id., 493; *Fletcher v. Morey*, Id., 567; *Mitchell v. Winslow*, Id., 630, 637.

Under the English act cited, the case of *Load vs. Green*, 15 Meeson and Welsby, 215, is exactly in point. A bought goods from B, with the fraudulent intention of not paying for them, and kept them until his bankruptcy, when they were taken possession of by his assignees in bankruptcy. The defrauded vendors, after demand and refusal to deliver, brought trover against the assignees, and the action was sustained. The court says, "As the goods were obtained by a fraudulent purchase, the plaintiffs had a right to disaffirm it, to revest the property in them, and to recover its value in an action of trover against the bankrupt; and as the assignees take, by virtue of the assignment, such interest only as the bankrupt has, the plaintiffs had the right to recover the value of the goods in the hands of the assignees in the same form of action on a conversion by them, unless they were entitled to the goods under the 72nd section."

Tenneys, Flower & Abercrombie and *E. A. Storrs*, of counsel.

DRUMMOND, J., charged the jury as follows:

This is a case of a sale to an insolvent person, who was supposed by the vendor to be solvent, with the expectation and belief by the purchaser that the goods would never be paid for.

There were also some facts connected with the transaction which it is proper for the jury to consider, as perhaps adding evidence to what is claimed to be a fraud on the part of the

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vendee at the time of the sale, namely, that the bankrupt, residing at a little village some few miles from Milwaukee, where he had transacted business for several years, and where under ordinary circumstances, the goods would be sent, requested the goods to be shipped to Milwaukee, for the reason, as the witness (his son) stated, that they could be hauled from Milwaukee to the bankrupt's place of business.

This, under the conceded facts of the case, may perhaps be assumed to be a false representation made by the witness.

The goods were shipped by the defendants as directed. They came into the possession of the bankrupt. Nothing had occurred to create any suspicion on the part of the defendants until the last of May or the first of June following, when, on the 5th of June, measures were taken to reclaim the goods, on the ground that the sale was fraudulent, and that the right existed on the part of the vendors, to make a reclamation. The goods, with the exception of about \$100 worth, were accordingly reclaimed by the defendants and taken possession of by them.

Now, under the facts of the case, the question is whether the action is maintainable by the assignee.

The main ground upon which it is said the action could not be maintained, is that by the filing of the petition in bankruptcy and the appointment of an assignee, he became the representative of the creditors, and that it was not competent for the vendors, notwithstanding the fraud that had been committed, to reclaim the goods, because it would be interfering with the rights of the general creditors; that other parties might have sold goods to the bankrupt; that these goods might have been disposed of or the proceeds of them have been distributed in various ways to the creditors of the bankrupt or otherwise, and that therefore to allow a person to come in under such circumstances and to reclaim the goods because he could identify them, would be giving him an unjust advantage over other creditors who had sold goods under similar circumstances, who would not have the power, owing to what might have

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occurred after the sale, to reclaim the goods or their proceeds.

That is substantially the ground upon which the case is placed on the part of the plaintiff, and as constituting the reason why the rights of the defendants are not the same as they would have been if no petition in bankruptcy had been filed.

The assignee in bankruptcy undoubtedly takes and holds the property in many respects differently from the bankrupt. The assignee has a right, as to the property, to do many acts which the bankrupt himself would not have the right to do. And it is not therefore true, absolutely and without qualification, that an assignee takes property precisely as the bankrupt held it at the time the petition was filed. He takes it with stronger right, and as representing all the creditors of the bankrupt. And the question is whether, under the circumstances of this case, he takes it so as to divest the right which the vendors would undoubtedly have had, as against the vendee, to reclaim the property.

The sale made by the defendants passed the title in the property to the bankrupt, but it passed only a defeasible title. That is to say, it could be rendered inoperative at the instance of the vendors, J. V. Farwell & Co. It was competent for the vendors to allow the bankrupt to retain possession of the property, and if before reclamation the bankrupt had parted with the property to a person who purchased it in good faith for value, that destroyed the right of reclamation by the vendors. So that it was a transfer of the title which might become absolute only at the option of the vendors. If the bankrupt retained the property at the time of the filing of the petition in bankruptcy, the title passed to the assignee in bankruptcy, and as we think the weight of authority is, it passed not as an absolute, but as a defeasible title, with the right still on the part of the vendors to reclaim the property, provided that it was done within a reasonable time after the sale and after knowledge of the fraud which had been perpetrated. Therefore, if you believe the facts stated by the wit-

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nesses, and if you believe that within a reasonable time after knowledge of the facts, the vendors reclaimed the goods, or took effectual measures for their reclamation, then we think that the action can not be maintained against the defendants.

It is, as I have said, substantially a question of law. We know there are many considerations which lead to an opposite conclusion. But looking at the case in all its aspects, and in view of the great weight of authority upon the subject, we feel inclined to give you this instruction, knowing that it is competent for the plaintiff, if he shall think that the view of the court is erroneous, to have it reviewed by the Supreme Court of the United States.

The Jury found a verdict for defendants.

For an elaborate discussion of the rights of the creditor, where the purchaser, at the time of the purchase, had no intention of paying for them, consult *Stewart v. Emerson*, 8 Bankruptcy Register, 462, and numerous authorities there cited.

The Supreme Court of Illinois has just decided that where goods have been obtained by fraudulent representations, they can be reclaimed at the option of the vendor, unless they have passed into the hands of an innocent purchaser, without notice, and that an attaching creditor is not such a purchaser, but takes them subject to all equities. *Frederick Schweizer, et al., vs. James M. Tracy, et al.* Opinion filed June, 1875, but not yet reported.—
[Reporter.

The Tug Oconto.

THE TUG OCONTO.

DISTRICT COURT.—EASTERN DISTRICT OF WISCONSIN.—OCTOBER 1873.

IN ADMIRALTY.

1. STEAM-TUG INSPECTION.—A steam-tug employed in towing rafts and lumber on a river exclusively within the state, is not a common carrier, nor liable to seizure for not having been inspected.

2. A seizure must be alleged in order to give the court jurisdiction.

This libel of information was brought under the act of Congress, approved February 23, 1871 (16 U. S. Statutes at Large, 440), entitled an "an act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes," to recover of this steam-tug a penalty of five hundred dollars for not having been inspected.

It is charged that the steam-tug at divers times between the 25th day of May, 1871, and the 25th day of May, 1872, was used and employed in the business of towing boats, rafts, and vessels on the navigable waters of the United States, to wit., from the city and port of Oconto, to and about the mouth of the Oconto river, and to sundry ports and places to and upon Green Bay in this district.

The answer of respondents denies the said allegation, and alleges that the tug is a small steamer, and between the times stated in the information, or so much of the time as the Oconto river was not obstructed with ice, she was used and employed in towing rafts of lumber on the Oconto river, and over the bar to vessels, onto which the lumber was to be loaded, and in towing vessels in and about the mouth of the Oconto river for the convenience of loading or unloading the same. It is further alleged that the Oconto river is not a navigable water of the

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United States within the meaning and intent of the act of Congress, and not, in fact, navigable for vessels employed in trade between two or more states; nor is said river susceptible of commerce over which trade or travel is or may be conducted in the customary mode of trade or travel by water; and that the tug was used exclusively in the said business at the mouth of the river, as vessels employed in commerce could not enter the river.

The respondents further allege in their answer that from the advice of counsel they did not believe that the tug so employed in said river came within the provisions, or object, or intent of the act of Congress, but to avoid difficulties they had at several times within the said dates applied to the inspectors of hulls and boilers to inspect the tug, but for reasons stated, it was not done.

Levi Hubbell, U. S. District Attorney, for the Government.

Finches, Lynde & Miller, for claimants, cited the following: *The Seneca*, 1 Bissell, 371, act of 1871 (16th U. S. Statutes at Large, 44), sections 1, 41, 47, 58 and 59; *The Daniel Ball*, 10 Wallace, 557; *The Farragut*, 6 Blatchford, (U. C., 207; *The Bright Star*, Woolworth's C. C., 266; *Navigation Co vs. Dwyer*, 29 Texas, 376; *Veazie vs. Moor*, 14 Howard, 568; *The Elizabeth Port & New York Ferry Co., vs. United States*, 5 Blatchford, 199; *United States vs. The Propeller Echo*, 4 Blatchford, 447; *Conway vs. Taylor's Executor*, 1 Black, 603.

MILLER, J.—By the proofs it appears that the Oconto river has its rise and flows into Green Bay within this state, and that boats not drawing over three feet of water may in the season of navigation pass up the river for a distance of about two miles to the small city of Oconto. The steam-tug Oconto was of about 40 tons burden, and from May 25th, 1871, to May 25th, 1872, she was employed in towing rafts and scows out

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of the river to vessels, and towing scows up to the town. The lumber was floated down the river and tied up at its mouth, and then the tug took the lumber in tow with a long line and towed it over the bar to the vessels lying in the bay, about three-fourths of a mile. After the rafts are towed to the side of the vessels the tug has nothing more to do with them. The vessels when loaded run to their said ports of destination on Lake Michigan. There is no harbor at the mouth of the Oconto river, and if the vessels could not pass over the bar into the river, they anchored in the bay in from 12 to 20 feet of water.

The boiler of the tug burst from the hydraulic test applied for the purpose of determining its strength and safety. The tug had no safety-valve, no water-gauge nor pump, no life preserver nor signal lights. For want of these things, and because of the bursting of the boiler, a certificate was refused. On the 23d of September, 1872, a certificate was given.

The act of 1871, under which this libel of information is brought, creates a full and well-digested system for the inspection, equipment and management of vessels propelled in whole or in part by steam, for the better security of life on board of such vessels. In the first section of the act it is provided that if any vessel, propelled in whole or in part by steam, shall be navigated without complying with the terms of the act, the owner or owners thereof shall forfeit and pay to the United States the sum of five hundred dollars for such offense, one-half for the use of the informer, and for which sum the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against by way of libel. This is the authority for bringing this libel of information.

Section 59 of the act provides "that the hull and boiler, or boilers of every tug-boat, towing-boat and freight-boat shall be inspected under the provisions of this act." In terms the tug Oconto is within the provisions of the act. But when we consider the constitutional power of Congress to regulate commerce with foreign powers and among the different states,

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was it the intention of Congress to require the inspection of a mere tow-boat employed in towing rafts and barges on waters within the state exclusively? The tug is clearly not within the scope of the act as indicated by its title, to provide for the better security of life on board. It had no means or arrangements for the accommodation of passengers. It does not appear that any arrangements were on board even for the accommodation or lodging of the men engaged in its navigation. The tug was not a common carrier of either passengers or freight. It discharged a mere towing duty for vessels employed in trade with this and other states.

The act of June 8, 1864 (13 Statutes at Large, 120) section 4, required the inspection of the hull and boiler of every vessel propelled in whole or in part by steam, and engaged as a ferry-boat tug in towing boats or canal-boat, in all cases where under the laws of the United States such vessel may be engaged in the commerce with foreign nations or among the several states. Under this act a steam-tug employed in towing on the Connecticut river exclusively within the State of Connecticut, was not a vessel engaged in commerce and was not within the provisions of this act.¹

Over domestic commerce within states Congress has no control, although it may be carried on by means of the navigable rivers of the United States, and Congress in its legislation steadily kept this in view, and a steamboat engaged in carrying passengers from one small town to others on a navigable river within one state is not required to be inspected.²

From an examination of the act, Feb. 28, 1871, section by section, and of all its directions and provisions in connection with the consideration of the constitutional grant of power to Congress, the presumption is that the section requiring the

¹ *The Farragut*, 6 Blatchford, 207.

² *The Bright Star*, Woolworth's Reports, 274; *Gibbons vs. Ogden*, 9 Wheaton 1; *Gilman vs. Philadelphia*, 3 Wallace, 713.

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inspection of hulls and boilers is not to be construed to embrace this tug. It is neither alleged in the libel nor proven that the tug had been seized. The libel of information will therefore be dismissed.

"Coasting vessels, steamboats, canal boatmen and those on rivers, and Ferry men are all common carriers, if their general occupation is to carry for the public." 1 Parsons on Shipping and Admiralty, 246-7, note 1, cases there collected.

For a full discussion of what are navigable waters of the United States, and the relative right of control over them by Congress and the states, consult *The Daniel Ball*, 10 Wallace, 557; *The Montello*, 11 do., 411; *City of Chicago vs. McGim*, 51 Illinois, 260-272.

As to the allegation of seizure, see *The Tug May*.—Ante p. 449. This case and *The Tug May*, were on appeal to the circuit court affirmed by Judge Drummund in November, 1874. See Vol. 6 of this Series.—[Reporter.

SAMUEL MYERS vs. WILLIAM H. COTTRILL.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN. — OCTOBER, 1873.

LIABILITY OF HOTEL-KEEPERS.

1. **GOODS OF COMMERCIAL TRAVELER.**—Where a guest at a hotel takes to his room valuable articles of merchandise and keeps them there for show and for sale, inviting purchasers to examine them, the hotel-keeper is relieved as to such merchandise from the special liability of the common law.

2. The fact that such guest sleeps in the room does not alter this rule.

3. **EFFECT OF WISCONSIN STATUTE. — HOTEL-KEEPER NOT BOUND TO PROVIDE SAFE FOR MERCHANDISE.**—The statute of Wisconsin does not alter this rule, for that did not contemplate the case of guests bringing quantities of merchandise to be placed in the safe, nor did it intend to compel an innkeeper to receive whatever merchandise his guests might choose to bring, nor to provide a safe to contain it.

4. **LIABLE FOR NEGLIGENCE.**—These rules will not, however, under either the common law, or the statute, excuse the innkeeper for the negligence of either himself or his servants.

5. The innkeeper, knowing that such goods were in the room, should use reasonable diligence with reference to the condition and value of the property.

6. **NEGLECTENCE IS A RELATIVE TERM;**—depending very much upon the circumstances of each case, and is frequently a mixed question of law and of fact.

7. **WIFE'S PROPERTY — WHEN HUSBAND MAY RECOVER FOR.**—Property belonging to the wife may be recovered for in an action brought by the husband, provided it was given to the wife by the husband.

8. The fact that the property of the wife was in the same room with the merchandise does not alone prevent him from recovering.

9. **HOTEL-KEEPER MUST BRING HIMSELF STRICTLY WITHIN THE STATUTE.**—The innkeeper in order to avail himself of the state statute as a defense must show that he has literally complied with it.

This was an action by Samuel Myers against William H. Cottrill, the proprietor of the Plankinton House in Milwau-

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kee, to recover the value of certain property alleged to have been stolen from his room in the Plankinton House, on the 29th of May, 1872.

The plaintiff and his brother were partners in business in Boston, and were in the habit of taking to different parts of the country for sale various articles of jewelry, which when thus taken were charged to the person taking it, and he was considered accountable to the firm for it.

The plaintiff and his wife arrived at the Plankinton House on the 27th of May, 1872, and were assigned to room No. 80, on the third floor of the hotel, to which room were sent his trunks and certain packages, forwarded to him by express, containing a large quantity of watches, chains and various kinds of jewelry, of the value of from \$15,000 to \$16,000.

The admitted object of the plaintiff's visit was to dispose of this property in the ordinary course of business, and immediately after his arrival he took part of it out of his trunks and arranged it in his room and from that time forward displayed it from time to time to different persons, and sold a considerable quantity of it. Either the plaintiff or his wife were in the room regularly except when absent at their meals.

On the morning of the 29th of May, between eight and nine o'clock, the plaintiff and his wife left their room to go to breakfast, leaving it in its usual condition, locking the door, and taking the key with them. On their return, in about twenty minutes, they found the door open, papers strewn on the floor and several empty watch-cases scattered about, the trunks open, having the appearance of having been rifled of their contents, and watches and jewelry of the value of about \$4,000 missing.

The alarm was immediately given, the police called and an examination of the apartment made by them, but no clew was found to the perpetrators of the robbery. There was no appearance that the door had been broken open, and a key which on trial was found to open the door was discovered up-

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on the bureau. In addition to this jewelry, there was also taken a gold watch and jewelry belonging to the plaintiff's wife, of the value of \$400.

The statute of Wisconsin concerning innkeepers, which was relied upon by the defense, is as follows:

§ 71. No innkeeper in this state, who shall constantly have in his inn, an iron safe, in good order, and suitable for the safe custody of money, jewelry, and articles of gold or silver manufacture, and of the like, and who shall keep a copy of this act printed by itself, in large, plain English type, and framed, constantly and conspicuously, suspended in the office, bar-room, saloon, reading, sitting and parlor room of his inn, and also a copy printed by itself in ordinary size plain English type, posted upon the inside of the entrance door of every public sleeping room of his inn, shall be liable for the loss of any such articles aforesaid, suffered by any guest; unless such guest shall have first offered to deliver such property lost by him to such innkeeper for custody in such iron safe, and such innkeeper shall have refused or omitted to take it and deposit it in such safe for its custody, and give such guest a receipt therefor.

§ 72. * * * Any innkeeper shall be liable for any guest in his inn, caused by theft or gross negligence of the innkeeper, or any of his servants, anything to the contrary thereof in this act notwithstanding.¹

It was conceded that the notice required by law to be posted in every room was not posted in the room occupied by the plaintiff.

Winfield Smith, for plaintiff.

1. The innkeeper is the insurer of the property of the guest within the inn. *Hulett vs. Swift*, 42 Barbour, 230; S. C. on Appeal, 33 New York, 571; *Calye's Case*, 8 Coke 32; *Mason vs. Thompson*, 9 Pickering, 280; *Sibley vs. Aldrich*, 33 New Hampshire, 553; *Richmond vs. Smith*, 8 Barnwell & Creswell, 9; *Piper vs. Manny*, 21 Wendell, 282; *Morgan vs. Ravey*, 6 Hurlstone & Norman, 265; *Ramaley vs. Leland*, 43 New York, 539; *Stanton vs. Leland*, 4 E. D. Smith, New York, 88; *Cashill vs. Wright*, 6 Ellis & Blackburn, 891; *Shaw vs. Berry*, 31 Maine, 478; *Clute vs. Wig-*

¹ Taylor's Statutes of Wisconsin, vol. 2, (1871,) pp. 1662-3.

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gins, 14 Johnson, 175; *Bennet vs. Mellor*, 5 Term Reports, 273; *Wilkins vs. Earle*, 44 New York, 172; *Hawley vs. Smith*, 25 Wendell, 642; *Burrows vs. Trieber*, 21 Maryland, 320; *Thickstun vs. Howard*, 8 Blackford, 535; *Taylor vs. Monnot*, 4 Duer, 116.

2. At all events he is liable for any negligence, and a loss is *prima facie* evidence of negligence. *McDaniels vs. Robinson*, 26 Vermont, 316; *Gile vs. Libby*, 36 Barbour, 70; *Johnson vs. Richardson*, 17 Illinois, 302; *Laird vs. Eichold*, 10 Indiana, 212; *Kisten vs. Hildebrand*, 9 Ben Monroe, 72.

3. The liability extends to goods and merchandise, as well as to the guest's personal baggage. *Calye's Case*, 8 Coke, 32; *Johnson vs. Richardson*, 17 Illinois, 302; *Richmond vs. Smith*, 8 Barnwell & Creswell, 9; *Piper vs. Manny*, 21 Wendell, 282; *Hawley vs. Smith*, 25 Id., 642; *Clute vs. Wiggins*, 14 Johnson, 175; *Farnworth vs. Packwood*, 1 Star-
kie, 198; *McDaniels vs. Robinson*, 26 Vermont, 333; *Newson vs. Azon*, 1 McCord, (S. C. Law,) 509; *Armistead vs. White*, 6 English Law and Equity, 349; *Mason vs. Thompson*, 9 Pickering, 280; *Morgan vs. Ravey*, 6 Hurlstone & Norman 265; *Taylor vs. Monnot*, 4 Duer, 116; *Berkshire Woollen Co. vs. Proctor*, 7 Cushing, 417; *Needles vs. Howard*, 1 E. D. Smith, 54; *Burgess vs. Clements*, 4 Maule & Selwyn, 306; *Bennet vs. Mellor*, 5 Term Reports, 273; *Towson vs. Havre-de-Grace Bank*, 6 Harris & Johnson, 47; *Kisten vs. Hildebrand*, 9 Ben. Monroe, 72; *Wilkins vs. Earle*, 44 New York, 172; *Hulett vs. Swift*, 33 New York, 571; *Bendet-
son vs. French*, 46 New York, 266; *Houser vs. Tully*, 62 Pennsylvania S., 92; *Kellogg vs. Sweeney*, 1 Lansing (New York,) 397; *S. C.*, 46 New York, 291, 293; *See Manning vs. Hollenbeck*, 27 Wisconsin, 202.

4. Slight, or even considerable negligence of guest does not exonerate innkeeper. *Classen vs. Leopold*, 2 Sweeney, (New York,) 705; *Shoecraft vs. Bailey*, 25 Iowa, 553; *Wilkins vs. Earle*, 44 New York, 172; *Cashill vs. Wright*, 6 Ellis & Blackburn, 891; *Buddenberg vs. Benner*, 1 Hilton, 84;

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Richmond vs. Smith, 8 Barnwell and Creswell, 9; *Profflet vs. Hall*, 14 Louisiana Annual, 530; *Berkshire Woollen Co. vs. Proctor*, 7 Cushing, 417; *Woodward vs. Birch*, 4 Bush, (Ky.) 510; *Quinton vs. Courtney*, 1 Haywood (N. C.) 40; *Burrows vs. Trieber*, 21 Maryland, 320.

5. Even if personal and actual notice to the guest of the safe, etc., would bring the case within the statute, so as to relieve the innkeeper (*Purvis vs. Coleman*, 21 New York, 111), nothing short of such notice would have that effect, *Lima vs. Dwinelle*, Vol. VII. Albany Law Journal, p. 44; *Bodwell vs. Bragg*, 29 Iowa, 232; *Richmond vs. Smith*, 8 Barnwell & Creswell, 9.

6. Though a guest may become his own insurer by taking *exclusive* charge of his room, yet the innkeeper is not relieved merely because he gives the guest a key. More especially, when as in this case, the keys of other rooms in the hotel unlock the plaintiff's door. *Farnworth vs. Packwood*, 1 Starkie, 198; *Newson vs. Axon*, 1 McCord (S. C. Law), 509; *Epps vs. Hinds*, 27 Mississippi, 657; *Berkshire Woollen Co. vs. Proctor*, 7 Cushing, 417; *Pope vs. Hall*, 14 Louisiana Annual, 323; *Johnson vs. Richardson*, 17 Illinois, 302; *Burgess vs. Clements*, 4 Maule and Selwyn, 306.

7. The innkeeper's liability extends to property brought into the hotel by the guest, though it belong to others. *Johnson vs. Richardson*, 17 Illinois, 302; *Epps vs. Hinds*, 27 Mississippi, 657; *Berkshire Woollen Co. vs. Proctor*, 7 Cushing, 417; *Needles vs. Howard*, 1 E. D. Smith, 54; *See Manning vs. Hollenbeck*, 27 Wisconsin, 202.

8. The merchandise in question was committed to the plaintiff by the firm of which he was a partner, charged to his account, and is to be accounted for by him, and although the partner has an equitable interest, the plaintiff may properly sue alone, as entitled to the sole custody, and as "trustee of an express trust" under the Wisconsin statute, which is taken from the New York code. R. S. Wisconsin, 858, Ch. 122, Sec. 14; *Kimball vs. Spicer*, 12 Wisconsin, 668, 671; *Gardiner*

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vs. *Kellogg*, 14 do., 605; *People vs. Norton*, 5 Selden (N. Y.), 176; *Minturn vs. Main*, 3 do (N. Y.) 220.

9. The letter of the plaintiff offered in evidence does not prove a contract. If it is evidence of a contract, such contract is not champertous. "Such an agreement is neither unlawful, immoral, nor disreputable." *Allard vs. Lumirande*, 29 Wisconsin, 502, 508.

Cary & Cottrill, for defendant.

DRUMMOND, J., after stating the facts, charged the jury as follows:

The counsel for the defendant insist that he is not liable for the merchandise stolen, because at the time of the alleged loss it belonged jointly to the plaintiff and his partner. But as I understand the facts, although there was no absolute sale of the property by the firm to the person who thus took it for sale, it was nevertheless considered as in his custody and to be accounted for by him to the firm in any event. This being so, the court instructs you that inasmuch as the property was within the custody and control of the plaintiff, he was a trustee of the property, accountable to the firm, and therefore can maintain an action for it in his own name.

The defendant was an innkeeper at the time. He was subject to the law applicable to innkeepers as to the property of guests in his house, either under the common-law or the statute law of this state. And the first question is, whether he was liable for the property, confessedly mere merchandise and not ordinary baggage of the plaintiff and his wife, which was in their room at the time they were the guests of the house.

The general rule of the common law undoubtedly was and is that an innkeeper is responsible for the property of a guest brought within the house, or within that which may fairly be considered as appurtenant to the house, and so within his custody. And perhaps it is not going too far to

say that it is very nearly an absolute liability, that is he is bound to see that the property is kept safe, as it is in his custody in contemplation of law. But conceding that to be the rule of the common-law do the facts in this case change the rule?

I think this is the true rule of law on the subject. If a person, going into a hotel as a guest, takes to his room not ordinary baggage, not those articles which generally accompany the traveler, but valuable merchandise, such as watches and jewelry, and keeps them there for show and sale, and from time to time invites parties into his room to inspect and to purchase, unless there is some special circumstance in the case showing that the innkeeper assumes the responsibility as of ordinary baggage, as to such merchandise, the special obligations imposed by the common law do not exist, and the guest, as to those goods, becomes their vendor and uses his room for the sale of merchandise, and really changes the ordinary relations between innkeeper and guest.

It is, we know, as a matter of experience impracticable for the landlord to notice and vouch for every person who goes into the room. The guest permits them to stay as long as he pleases, and shows his goods and sells them to whomsoever he pleases. We must presume that it is not for that purpose that the innkeeper allows persons to come to his house and enter his rooms, and the fact that the vendor may sleep in the room I do not think changes the rule. Therefore the court will leave it to you as a question of fact to say whether or not the evidence brings the case within the conditions stated; that is, whether or not the plaintiff did use room No. 89 as a place for showing and selling his merchandise as such. If he did, in the absence of evidence proving the contrary, then I think, as to that, the extraordinary obligations of the innkeeper did not exist.

One point to be considered is as to the effect of the special act of the Legislature of this state as to the liability of innkeepers. It is a question not free from difficulty perhaps,

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but I am inclined to think that the law of Wisconsin did not contemplate the case of guests bringing to the inn quantities of merchandise to be placed in the safe. The law may be said to assume that there is a safe in the house, but it is not to be assumed that it was within the intention of the Legislature that an innkeeper should have a safe so large as to retain any quantity of merchandise that guests might bring into the house, and thus turn the hotel into a warehouse. It is very difficult, undoubtedly, to decide precisely what meaning is to be attached to the language of the statute, when it speaks of "money, jewelry, and articles of gold and silver manufacture, and of the like," whether, in other words, it intends to include the ornaments which a lady, for example, may have, and from time to time wear about her person, and which may be and often are of very great value. I think, however, that it is clear that it was not within the contemplation of the law-makers to compel the innkeeper to take in any quantity of merchandise, however bulky or valuable it might be, which the guests might choose to bring into the house.

Here the plaintiff brought into this house a large quantity of watches, chains, and other jewelry. They were confessedly not used either by himself or his wife as travelers, but he was there with them as a merchant selling goods, and I do not think the statute contemplates a case of that kind. So that it depends upon the general principles of law whether the defendant is liable for the merchandise if it were taken.

Although in one aspect of the case the defendant might not be liable, still the fact that these articles were there as merchandise, and were exposed and sold in the manner stated, would not prevent the plaintiff from recovering the value of the property if there was any negligence on the part of the defendant or of his servants, for I am not prepared to go so far as to say that the principle which I have stated will excuse the innkeeper for the negligence either of himself or of his servants. But that is a question to be determined by the jury under the instructions of the Court; for example,

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whether or not the defendant knew that the goods were there and shown and sold in the manner stated; whether or not he had provided the proper means of security for the goods. I will not say that it was incumbent on the defendant if he knew they were there to keep a watchman in the hall and at the corners to watch the ingress and egress of every person that might come or go. But he should have used reasonable diligence with reference to the condition of the property, as one whose duties and responsibilities may have been qualified by the special circumstances of the case, he being to some extent relieved from the extraordinary responsibility of an innkeeper.

And it is also proper for you to consider whether or not there was a key to the room, or whether there were keys of other rooms that would open the door of No. 80, and which would enable any person or any guest in the house to enter the room, because, of course, a guest may be a thief as well as an outside intruder or the servants of a hotel. Then if the defendant or his servants were guilty of negligence, and of course if his servants abstracted the property, the defendant would be liable.

Another question proper for the jury to consider is whether or not the plaintiff was himself guilty of any negligence. Negligence is a relative term depending very much upon the circumstances of each case. We feel it our duty sometimes as a Court to say, under conceded facts of a case, whether or not they constitute negligence, and to instruct a jury absolutely that such facts do or do not constitute negligence. At other times, it is a mixed question of law and of fact, partly for the court and partly for the jury to determine, whether or not there is negligence in a given case.

A person might be in a hotel as an ordinary guest, and protected in every way in which a guest could be in his property, and yet might be guilty of such negligence as to prevent him from recovering for its loss. For example, if a man occupies a room in a hotel and goes out and leaves his door

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open, and on his table, exposed to view, a large sum of money, where persons are passing backward and forward in the hall, there perhaps would not be a difference of opinion. Every man would say the guest had no right to go out of his room and leave his door open, and a large sum of money thus exposed, tempting the cupidity or the criminality of any person who might happen to see it. That may serve as an illustration. I think that we may say that there is more care required of a guest in a hotel, where he has articles of great value in his room, and especially when he is aware that it is known by many persons that they are there, than if he had but ordinary baggage. Now it is for you to say, taking the testimony of the plaintiff, whether there was any want of due care on his part which contributed in any way to the loss of this property. He says—and if that is true, and you believe that statement, of course it goes very far to show that there was a very considerable amount of care exercised as to the custody of this property—that either he or his wife was always there except when they went to their meals.

It is insisted on the part of the defendant that the value of the property which belonged to the wife, and which it is alleged was taken, cannot be recovered in this action. I shall instruct you that it can be recovered, provided you believe from the evidence that the property lost was given to the wife by the husband. For it depends upon different rules from those stated in relation to the merchandise. It is said that there was about \$400 worth of property of the wife taken, one article of which was a very valuable watch.

I am not prepared to say that if the plaintiff had those goods in the room, and was showing and selling them, and they together with other property belonging to his wife were taken, that circumstance alone would prevent him from recovering for the property of his wife. That may depend upon the construction to be given this special act of the Legislature upon the subject. It is very difficult, as I have stated, to limit or qualify this act of the Legislature so as to exclude the ordi-

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nary articles of ornament which a lady may be in the daily habit of wearing about her person. For example, I hardly think that it could have been the intention of the Legislature to require every guest that entered a house to deposit his watch in the safe of the hotel.

MR. COTTRILL — Will your honor allow me to state that in a case at Madison the Supreme Court of this state expressly held that the Legislative act covered the watch of the guest which he had put under his pillow.¹

COURT — Very well. If the Supreme Court of this state has so held, and it is the settled law of this state, of course we may feel obliged to acquiesce in that decision, and to rule accordingly. I was about to say that I doubted very much whether it was the intention of the law to compel every man when he went to bed, instead of putting his watch under his pillow or somewhere where he could see the hour, to put it in the safe, but if the Supreme Court of this State has so declared, we will acquiesce in that decision. Our rule is to follow the decisions of the Supreme Court of the State. I would like to see that decision. [Counsel produces it.] Well, if that is the law of this State, then I think it my duty to say to you that before the innkeeper would be exempt from liability for the loss of the wife's property he must show that he has literally complied with the law. He must do all these things specified in the act, and prove them, in order to exempt himself from liability. And if this decision is to be received, and these facts are all proven, then I suppose that the innkeeper would not be responsible for the property of the wife. Otherwise he would be. Now, in regard to the wife's property, if the plaintiff has been guilty of negligence, of course the same rule would apply as I have stated it, and so if the defendant or his servants had been guilty of negligence, even if he had complied with the act of the Legisla-

¹ *Stewart v. Parsons*, 24 Wisconsin, 241—[Reporter.

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ture, because the law excepts the negligence of the inn-keeper or his servants.

The jury returned a verdict of \$456.15, the value of the watch and jewelry belonging to Mrs. Myers, with interest.

JOHN CASHAU vs. THE NORTHWESTERN NATIONAL INSURANCE COMPANY.

CIRCUIT COURT.—EASTERN DISTRICT OF WISCONSIN.—OCTOBER TERM, 1873.

1. NOTICE AND PROOFS OF LOSS.—The condition in a policy of re-insurance, that all persons having a claim in case of loss shall proceed at once to give immediate notice and render a particular account of the loss, etc., means that the notice and schedule must be served in a reasonable time under the circumstances.

2. SERVICE OF COPY PROOF OF LOSS.—The service of copies of proofs of loss and of notice, etc., upon the re-insurer is sufficient if not objected to at the time.

3. LIABILITY OF RE-INSURER.—The condition in a policy of re-insurance, that in case of loss the re-insurer shall pay *pro rata* at and in the time and manner as the re-insured, means that the re-insurer shall have all the advantages of the time and manner of payment specified in the policy of the re-insured. It has no reference to the insolvency of the re-insured.

The Fulton Fire Insurance Company of New York, insured Simpson, Norwell & Co. against loss or damage by fire, to the amount of \$5,000, on a stock of goods in their store in Chicago, for the term of one year from the 21st of October, 1870; and the defendant company on the same day re-insured the

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Fulton Fire Insurance Company in the same amount. The conditions of the policy issued by the defendant company were, "That the loss be paid immediately after due notice and satisfactory proof of the same, and in no event shall this company be liable for a sum greater than such portion hereby insured bears to the whole sum insured by the company re-insured. And in case of loss this company shall pay *pro rata* at and in the same time and manner as the company re-insured. And all persons having a claim under this policy shall proceed at once to put the property in the best order, and give immediate notice and render a particular account thereof in writing under oath, stating the time, origin and circumstances of the fire." On the 9th of October, 1871, and while the policy was in force, the insured goods were destroyed by fire. The Fulton company was made insolvent by that fire, and a receiver was appointed and qualified on the 16th of October. Proof of loss was made November 9th, with schedule of adjustment, showing loss at \$4,689.66, and was served on the receiver of the Fulton Company December 8th. January 22d, 1872, the receiver of the Fulton Company addressed a note to the defendant company, enclosing proofs of loss, the receipt of which was acknowledged by the secretary of defendant, January 27, 1872, without objection. December 29, 1871, notice of service of proofs on the Fulton Company, and that the defendant is held liable, were served on Alexander Mitchell, the president of the defendant company, and their receipt was acknowledged by the secretary, January 4, 1872. The Fulton Company had paid the insured twenty per cent. on the loss. No objection had been made to the service of copies of the proofs and adjustment. The jury under instructions from the court found a verdict for the plaintiff, who sued as assignee of the receiver of the Fulton company, for the amount at which the loss had been adjusted, with interest. The defendant's counsel moved for a new trial.

Finches, Lynde & Miller, for plaintiff.

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Palmer & Hooker, for defendant.

MILLER, J.—The motion for a new trial is founded upon three points:

1. The notice and proof were not given in time, and are not such as the defendant's policy calls for.
2. They do not purport to be originals, but are copies.
3. The defendant is not liable to pay the whole amount adjusted, but only a *pro rata*.

The receiver of the Fulton Company, gave the defendant the copies of the notice and proofs which he had received from the agent in Chicago. The secretary of the defendant company acknowledges the receipt of the copies without making objections as to the time or manner of the service, and not making demand for the originals. I think, that under the delay necessarily arising out of and connected with the insolvency of the Fulton Company, the service of copies of notice and proofs of the loss—particularly in the absence of objections on the part of the defendant—should be adjudged to have been given in time, and to be a substantial compliance with the condition of the defendant's policy.¹

The word *immediate* must mean a reasonable time under the circumstances.

The contract of re-insurance is one of indemnity between the insurer and the re-insurer. It has no connection with the insured, except in the nature of a surety in equity. The re-insurer may discharge its liability by paying the amount of the policy to the insured, as owner of the property insured, or to the re-insured. The financial condition of the re-insured is not to be taken into account in the computation of the

¹ *The Bowers Insurance Company vs. The New York Insurance Company*, 17 Wendell, 357; *O'Neil vs. The Buffalo Fire Insurance Company*, 3 Comstock, 122. Due good faith requires that objections to proof, etc., be pointed out. *Etna Insurance Company vs. Tyler*, 16 Wendell, 885; *Flanders on Fire Insurance* 563, 564, 565, 566, and cases there cited.

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amount to be paid on the policy of re-insurance. The insolvency of the original insurer is no defense, in whole or in part, to a suit against the re-insurer. It is claimed on the part of the defendant that the condition in its policy is an exception to this position of the law. The amount of percentage paid by the receiver of the Fulton Company to the original insured has no relation to or connection with the defendant's liability under the policy of re-insurance. The condition in that policy, that "in case of loss the Company shall pay *pro rata* at and in the same time and manner as the re-insured," cannot mean that in case of the insolvency of the Fulton company the defendant shall only be obliged to pay the *pro rata* of the dividends of the assets of said company, upon the claim of the first insured. It cannot have such application. The condition means that the defendant shall pay at and in the same time and manner as the re-insured company shall pay or be bound to pay according to its policy, and that the defendant shall have all the advantages of the time and manner of payment specified in the policy of the Fulton Company—otherwise the defendant's policy would not be the contract of indemnity intended, and endless litigation might ensue.¹

The motion for a new trial is over-ruled.

See further where notice is to be given forthwith, *Beatty vs. Lycoming Mutual Insurance Company*, 66 Pennsylvania, S. 9.

As to what is a waiver of conditions in regard to the furnishing of proofs of loss, etc., see *Cahill vs. Atlas Insurance Company*, and cases there cited, *ante* p 211.

For a full collection of authorities on liability of re-insurer, consult *Ex parte Norwood*, Vol. 8 of this Series, p. 504.—[Reporter.]

The New York Marine Insurance Company vs. Protection Insurance Company, 1 Story, 458; *Currington vs. Commercial F. & M. Insurance Company*, 1 Bosworth, 152; *Flanders vs. Fire Insurance*, 32, 33 and notes; *In re Republic Insurance Company*, 8 Bankruptcy Register, 197

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DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—NO-
VEMBER, 1873.

IN BANKRUPTCY.

PLEADING AND PRACTICE.

1. The answer of the debtor to an involuntary petition must be in writing and verified.
2. The rules governing pleadings in common-law cases apply to the pleadings under the 41st section of the Bankrupt Act, and the allegations of the debtor should be presented and embodied in substantially the same form as defenses in common-law cases.
3. The court may in its discretion issue a special venire and impanel a jury to try the issue at any time, without waiting for a regular term.

A petition was filed in this court against the above debtor, alleging as acts of bankruptcy, that he, being a merchant, had suspended and not resumed payment of his commercial paper for a period of fourteen days, describing the particular paper upon which the allegation was founded. Whereupon an order was issued that he show cause on the 17th inst., an injunction granted, and provisional warrant issued for the seizure of the debtor's property. The debtor appeared on the return day, and after moving for a continuance, which was denied, presented a general denial of the acts of bankruptcy set up in the petition, together with the demand that the same be inquired of by a jury, as provided in section forty-one of the bankrupt act, properly signed by the debtor, but not verified.

The counsel of the petitioner objected to the answer, be-

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cause not verified, and insisted that the answer of the debtor to allegations of the petition should be verified before it was filed or admitted as constituting an issue for trial either by court or jury.

Orton, Keyes & Chynoweth, for petitioning creditors.

S. U. Pinney, for debtor.

HOPKINS, J.—This question has been raised on other occasions before me, and on intimating that I thought it a better practice to add a verification, parties have complied, and in that way the practice here has become settled to annex affidavit.

But in this case the counsel for the debtor challenges the authority of the court to require a verified answer. So I have to examine and determine the question in a more considerate manner than I have heretofore done.

The section under which these proceedings are had is quite vague, and the meaning somewhat uncertain.

It does not provide in what form the issue between the petitioning creditor and the debtor shall be framed. That seems to be left for the courts to arrange and determine.

It ordains that the court shall "proceed summarily to hear the allegations of the petitioner and debtor, and * * * if the debtor on the same day so demand in writing, order a trial by jury * * * to ascertain the fact of such alleged bankruptcy."

This is all there is on the subject of forming the issue for trial, in the act. But it is claimed that "Form 61," in General Forms adopted by the Supreme Court under the authority contained in the act, being all there is in relation to that matter, is all that is necessary to constitute an issue for trial.

I can not adopt that view. That is the form of the order to be entered by the court. It is not an act or allegation of the debtor, but is an order of the court, based upon the alle-

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the debtor previously presented or communicated to the court in some form, either orally or in writing.

The court is required to hear the "allegations of the petitioner and debtor."

The question is, what is meant by the word "allegations." On the part of the petitioner it must mean those stated in his petition on file, so as to him it means written allegation, and if so, for what reason should the courts permit or hold that the allegations of the debtor should be presented in a less formal and certain manner? I am unable to discover any. A reasonable construction would require the debtor's allegations to be reduced to writing, and in such form as to raise an issue analogous to issues in other cases triable by a jury.

The word "allegations" is used in the act in the sense of pleadings, as meaning a formal statement of the acts of bankruptcy in the petition, and a like formal defense of the debtor thereto, either a general denial which would put in issue all facts stated in the petition, or a statement of any matters in avoidance according to the rules governing pleadings in common-law cases. Construed in this way, it gives the proceedings the essential form used in other judicial proceedings, whereas the construction contended for by the debtor's counsel makes the proceeding anomalous, and not subject to any known rules relating to the forming of issues for trial before courts, and especially before juries. I think, in view of the objects to be obtained, and the manner of obtaining them, that the section should be construed as requiring the debtor to answer the petition in writing, and in courts where defenses are admissible upon oath of party only, that the same rule should apply to the answer of debtors to petitions filed against them under the provisions of the bankrupt law.

There has been some contrariety of opinion among the district judges on this question, and the practice in the different districts is not uniform.

But since the construction given in the case of the *Knickerbocker Ins. Co. v. Comstock*, 5 *Chicago Legal News*, 422,

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by the Supreme Court of the United States, I am satisfied that in those courts where a verified answer in common law cases is necessary, it is equally imperative to file a verified answer in cases of this character.

Justice Clifford, who wrote the opinion of the court in that case, in considering the proceedings under this section, says: "Such a provision is certainly entitled to a reasonable construction, and it seems plain when it is read in the light of the principles of the Constitution and of analogous enactments, and when tested by the general rules of law applicable in controversies involving the right of trial by jury, that the process, *pleadings*, and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil actions at common law."

I understand from this language that the allegations of the debtor should be presented and embodied in substantially the same form as defenses in common-law cases.

The learned judge, in another part of his opinion, speaks of the petition as the "first pleading" of the moving party. If a pleading, it should be answered in the same way as other pleadings—in writing.

Such a construction gives to the proceedings a judicial character, and harmonizes them with the proceedings ordinarily taken in suits in courts.

A general denial is tantamount to the general issue, and casts the burden of making out the case upon the petitioning creditor, and special matter in avoidance should be set up and presented in form of special pleas, as in other cases.

If the pleadings are to be governed and controlled by the rules and regulations in common-law cases, the answer must be verified, for the code practice of this state is now the law governing pleadings in the federal courts in common-law cases.¹

¹ 17 U. S. Statutes at Large, 197.

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And the code requires all answers to be verified when the first pleadings of the moving party are verified; so, if I am right in my understanding of the decision of the Supreme Court, the debtor must verify his answer to the petition, else it may be treated as a nullity. Debtors are required to put in verified answers in the Northern District of New York.¹

In *In re Sutherland*, 1 B. R., 140, it is held that whether the answer should be verified or not, depended upon the general rules of the court in regard to pleadings in bankruptcy. That case concedes the power of the bankrupt court to make rules requiring it. But under the decision of the Supreme Court *supra* special rules are not necessary, for it is there held that the "process, pleadings and proceedings are governed by the rules prescribed in common-law cases." In reaching this conclusion I have followed certain well-settled rules and principles in relation to pleadings and issues in courts of justice.

The general rule in all courts is to require a pleading or petition to be answered in as solemn a manner as it is required to be made—if made under oath to require the denial or answer to it to be under oath.

This was always the rule in equity, and latterly has commended itself to courts of law, so that the rule, in states where the improved system of pleading is adopted, is to require verified pleadings to be answered only upon the oath of the other party. Therefore requiring a sworn answer from the debtor is but assimilating the practice in cases and proceedings under this section to the practice of the courts in other cases and controversies.

It seems to me that the reasons for requiring a sworn answer in these cases are very apparent and cogent, as is well illustrated in this case.

This debtor is an extensive grocery merchant, with a large

¹ *In re Safe Deposit and Savings Institutions*, 7 Bankruptcy Register, 393.

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and valuable stock of goods. They were seized, and are now in the custody of the marshal under a provisional warrant, being held at a large expense for rent, etc., and also subject to material deterioration, which, if the debtor is a bankrupt, as is alleged in the sworn petition of the creditor and affidavit of another party filed with it, must be at the expense of his creditors; hence, to require the alleged bankrupt to meet such an allegation with a sworn denial, is not unreasonable, or a hardship that he can very meritoriously complain of.

But this is not all. In this district we have but two stated terms a year, and unless a special jury is ordered the issue can not be tried until next June, and if one is ordered, as the justice of the case would almost seem to demand, it will be at a large public expense, which certainly ought not to be incurred unless there is a *real* defense to allegations or acts of bankruptcy set out in the petition. And if a debtor is permitted to answer without verification, I do not see any way of escape from the most vexatious and unreasonable delays on his part, destitute of merit or advantage to him, and burdensome and expensive to his creditors, besides casting an additional charge upon the public, and occupying the time of the court in the trial of frivolous issues. Such unjustifiable practice by a debtor can not be allowed, according to my understanding of the true intent and meaning of the section of the act under consideration. I therefore hold that the answer of a debtor to the petition must be verified the same as pleadings in suits at common law, and reject the proposed answer of the debtor until verified.

After this decision, the debtor filed a sworn denial of the acts of bankruptcy; whereupon the petitioner's counsel moved for a special venire to summon a jury to try the issue. The court held that the first section of the Bankrupt Act authorized such a practice, and directed the clerk to issue a special venire for that purpose, returnable at an early day, to be agreed upon to suit the parties.

Contra.:—Neither the bankrupt law nor form sixty-one require that the

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answer to a creditor's petition, to entitle the debtor to demand and have a hearing by the court or a trial by jury, should be verified, or even in writing. *In re Heydette* 8 Bankruptcy Register, 832.—[Reporter.

In re SALKEY.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—NOVEMBER, 1873.

IN BANKRUPTCY.

1. EXAMINATION OF DEBTOR BEFORE ADJUDICATION.—The District Court may order the examination of the debtor against whom a petition in bankruptcy has been filed, prior to the adjudication, even though he denies both the indebtedness and the act of bankruptcy.

2. WHEN ALLOWED.—Such an examination should not be allowed for the purpose of gratifying malice or curiosity, but simply in the furtherance of justice, and to protect the rights of the creditors.

This was a revisory petition under the 2d section of the bankrupt act, to review an order of the district court granting the petitioning creditors leave to examine the debtors before the register.

On the filing of the petition by the creditors, Rindskoff, Barbe & Co., on the 8th day of October, 1873, a rule to show cause was issued and served upon the respondents, Samuel Salkey and Joseph Gerson, who appeared and filed a denial of the indebtedness claimed in the petition, and also denying the acts of bankruptcy alleged, and asking for a trial upon the issues by a jury.

This order for the examination of the debtors was granted

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on the 14th day of October, 1873, before adjudication of bankruptcy.

Tenneys, Flower & Abercrombie, for petitioning creditors.

Grant & Swift, for respondent.

DRUMMOND, J.—The question is whether it is competent for the district court, when a petition in bankruptcy is filed, to make an order for the examination of the debtor, prior to an adjudication of bankruptcy. No question is raised as to the propriety or necessity for the examination in this case, but it is denied that the district court has power, under the bankrupt law, to authorize an examination before an adjudication in bankruptcy.

The question arises under the 26th section of the bankrupt law. That section provides that the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times, require the "bankrupt," upon reasonable notice, to attend and submit to an examination, on oath, upon certain matters therein specified.

It is said that the word "bankrupt" is used here, and that there is a distinction made in the bankrupt law, prior to and subsequent to the adjudication in bankruptcy—the law speaking of the party against whom the application is made, in the one case, as a "debtor," and in the other as a "bankrupt." And it is insisted that the word "bankrupt" indicates that an examination can not be had until after an adjudication in bankruptcy; because, strictly speaking, the debtor can not be said to be a "bankrupt" until he is so adjudicated by the court.

In one sense this is true. He does not necessarily become, technically, a bankrupt, until he is decided so to be by the court; but the argument urged that this inquisitorial power should not be exercised over the debtor for the purpose of prying into his business affairs, and because the examina-

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tion might be injurious to his credit, by disclosing facts affecting the same, can hardly have much weight, when it is recollected that the law provides certain means by which the court may proceed to determine whether or not the debtor committed an act of bankruptcy. The power of the court seems to be plenary, prior to the adjudication, not only over the debtor's property, but over his person.

It might be said, with as much reason, that the court should not exercise this power over either his property or his person, until it had actually decided him to be a bankrupt, because if, upon a trial of the fact of bankruptcy, he should be decided not a bankrupt, of course all the proceedings would become irregular.

An examination under the order as made in this case, is something which necessarily grows out of the administration of the law, which gives to the court, under certain circumstances prescribed therein, power over the person and property of the debtor, for the purpose of protecting the rights of creditors.

It would seem, therefore, that the word "bankrupt," in the 26th section, might not necessarily mean a debtor who has been adjudicated a bankrupt, but only one against whom proceedings in bankruptcy have been commenced.

Independently of the 26th section, however, and whatever may be the true construction of the language there used, it would seem to follow, as a necessary consequence from the general scope of the bankrupt law, that circumstances might exist, after the commencement of proceedings in bankruptcy, and after the debtor is brought within the control of the court, which would warrant an immediate examination. This should not be allowed when sought for the purpose of gratifying an unwarrantable curiosity, or for prying into the business or secrets of a debtor, but simply in furtherance of justice and to protect the rights of creditors.

It will be observed that the 26th section not only permits this examination upon the application of the assignee, or of a

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creditor, but authorizes the court of its own motion, to direct an examination.

But it would be the duty of the court, undoubtedly, at any time, when satisfied that an examination had been sought or was being carried on to gratify malice or mere curiosity, and not to promote justice, at once to arrest it.

The bankrupt law allows proceedings in bankruptcy to be commenced under a certain state of facts, at the same time that it throws around the debtor guaranties against unwarrantable and unnecessary proceedings, by requiring that these facts shall be proved by the oaths of witnesses. That being done, a *prima facie* case exists, and then the law clothes the court with all the powers necessary to accomplish the great object in view--namely, to protect the general creditors of the debtor, by discovering and taking possession of all his property for equal distribution among them.

One of the principal objects of the law would be frustrated if adequate means were not provided for the ascertainment of all the facts affecting the property of the debtor, as if it could call only upon the debtor himself, and not as well upon other persons, to disclose all his and their knowledge with reference thereto; and so the 26th section expressly gives this power to the court as to other witnesses.

So that, on the whole, in view of the purpose of the 26th section, and the general scope of the bankrupt law, I cannot doubt the existence of the power exercised in this instance, by the district court.

Undoubtedly, it should not be exerted prior to adjudication in bankruptcy unless in case of actual necessity. It is not as of course, but only under such exigencies as seem to require its exercise for the purpose of promoting justice and the rights of creditors.

The order of the District Court is affirmed.

Smith vs. Little.

JOSEPH H. SMITH, ASSIGNEE, ETC., VS. CHARLES H.
LITTLE, ET AL.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—
NOVEMBER, 1873.

IN EQUITY.

PREFERENCE—LIMITATION.

1. Where the obligor on a bond, in order to indemnify his sureties, obtains securities from one of his debtors and turns them over to his sureties, the transaction is a preference between the parties, under the first clause of the thirty-fifth section of the Bankrupt Act, and not a transfer under the second clause, and the four months' limitation applies.

2. The fact that the securities were made to run directly to the sureties does not change the character of the transaction when they were obtained at the instance of the obligor. A court of equity will look at the substance rather than the form of the transaction.

3. RETAINING JURISDICTION.—Where a bill must be dismissed for want of equity, jurisdiction will not be retained to settle the priorities or equities between the defendants.

This was a bill in chancery filed by Joseph H. Smith, assignee of Jacob and Ezrom Mayer, against Charles H. Little and others, to set aside certain mortgages made by said bankrupts to the defendants.

Geo. Scoville, for complainant.

J. M. Bailey, for defendant.

T. J. Turner, for Mrs. Wm. B. Mayer.

BLODGETT, J.—The facts in the case, as they appear from the pleadings and proofs, I find to be these:

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On the 14th of May, 1870, and for some years previous thereto, Ezrom Mayer had been treasurer of the Freeport School District, embracing the city of Freeport, and had given his official bond as such treasurer, with defendants Little, Clayton, Bartlett and McCall as his sureties. He was also at the same time School Treasurer of Town 27, N. R. 8, in Stephenson county, with defendants Little, Clayton, Bartlett, McCall and Miller as his sureties.

At about the date mentioned, it was ascertained that said Ezrom was a defaulter in his office as such treasurer, and that his sureties would probably be compelled to make good the delinquency. They accordingly applied to him for indemnity and he procured his father, Jacob Mayer, to make and deliver to said sureties a mortgage on his farm, near Freeport, for \$5,000, dated May 14, 1870, also to assign to said sureties a mortgage for \$2,100, dated May 21, 1869, from Win. B. Mayer and wife, to said Jacob Mayer. At the same time Ezrom and wife made and delivered to his said sureties a mortgage for \$2,000, on his homestead in Freeport.

Suit was brought on the official bond of Ezrom, as treasurer of the Freeport School District, and judgment recovered against him and his sureties, Little, Clayton, Bartlett, and McCall, for \$7,351.36 and costs, at the December Term of the Stephenson County Circuit Court, which judgment on appeal was affirmed by the Supreme Court, and has since been paid by said sureties, each contributing equally, the total amount at the time of payment being about \$8,000.

There did not seem to be any defalcation as Township treasurer, and the defendant Miller sets up no claim to the securities turned out.

These mortgages, although dated on the 14th of May, 1870, were not delivered until the 16th of that month, on which day the transaction was consummated.

On the 12th day of November, 1870, a petition in bankruptcy was filed in the district court of this district, against said Jacob Mayer and Ezrom Mayer, on which they were

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subsequently adjudicated bankrupts. The plaintiff was duly elected assignee of said bankrupts, and now brings this suit to set aside said conveyances as having been made in violation of the bankrupt act. It is admitted that the homestead of Ezrom is incumbered by a prior mortgage to its full value, so that no importance is attached to the \$2,000 mortgage by him and no argument is made in regard to that point.

It appears from the evidence that Ezrom Mayer had been for several years prior to the transactions complained of, cashier of the First National Bank of Freeport, and that during the years 1865, 1866 and 1867, Jacob, Ezrom, and Martin Mayer were engaged in carrying on the confectionery and bakery business, in Freeport, under the firm name of Jacob Mayer & Sons. This firm was dissolved on the first of January, 1868, and Jacob Mayer took and continued to carry on the confectionery branch of the business, the bakery being taken and carried on by his son Martin.

Jacob Mayer is now about sixty-nine years old, and has never taken any active part in the management of the business of either said firm of J. Mayer & Sons or J. Mayer.

At the dissolution of the firm it was indebted to Ezrom Mayer in about the sum of \$3,367. And after the dissolution of said firm said Jacob became further indebted to Ezrom to the amount of about \$4,500.

This, together with the indebtedness of the old firm to Ezrom, with interest, made, as he states, the amount upward of \$9,000, due from Jacob to Ezrom at the time of giving the mortgages in question.

It does not appear from the evidence that any direct dealing was had between defendants Little, Clayton, Bartlett and McCall, and Jacob Mayer, in regard to these mortgages. They called on their principal, Ezrom Mayer, to indemnify them against their liability as his sureties, and he induced his father to make the \$5,000 mortgage and assign to them the one for \$2,100. The negotiations by which the mortgages were obtained from Jacob Mayer were conducted by or on

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behalf of Ezrom, and not by or on behalf of the sureties. And it does not appear that in these negotiations Ezrom claimed these mortgages from his father on account of the indebtedness due him from his father.

The complainant insists that this mortgage for \$5,000 and the assignment of the one for \$2,100, should be set aside as fraudulent within the second clause of the 35th section of the bankrupt law.

The defendants contend that this transaction comes within the first clause of said section,—or, in other words, that all the facts, when taken together, characterize this as a preference by Ezrom Mayer in favor of the sureties on his treasurer's bond within the provisions of the first clause, rather than a conveyance by Jacob Mayer within the second clause. This is the turning point in the case.

If this transaction be deemed only a preference by Jacob Mayer, debtor, to Ezrom Mayer his creditor, and by Ezrom to his sureties, then it is barred unless a petition in bankruptcy is filed within four months of the transaction; while if it is to be treated as a transaction between Jacob Mayer and the defendants, under the second clause, then the six months given by that clause had not transpired, within four days, at the time the petition was filed.

The case is not free from doubt in my own mind upon the facts proven, but my conclusion, after careful consideration, is that the giving of these mortgages should be treated as a preference of Ezrom Mayer's creditors.

The defendants had no dealings with Jacob Mayer. They demanded security from Ezrom, and he brought them these mortgages. They did not know Jacob Mayer in the transaction, and had no concern with the means by which Ezrom obtained the security from Jacob. The proof shows that Jacob was indebted to Ezrom to an amount largely in excess of the two mortgages, and although Jacob was not requested to execute them on the express ground of his indebtedness to Ezrom, but rather on the ground that Ezrom needed these

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securities to relieve his embarrassments with his sureties, and save him from going to jail, yet there was ample consideration to support them on account of the indebtedness to Ezrom.

Suppose Ezrom Mayer had taken the \$5,000 mortgage and the assignment of the other directly to himself and had then transferred them to defendants, I think there would be no doubt but that the transaction would only amount to a preference, and a court of equity will not regard the form in which a thing is done, but rather its substance and effect.

Although no allusion seems to have been made to the indebtedness existing between them at the time Ezrom applied to his father for the securities, yet I must presume that it was in the minds of the parties, and formed the moving consideration for them. It being abundantly established by the proof that Jacob was at that time indebted to Ezrom in more than the amount of the two mortgages, being so indebted, he, gave a preference to Ezrom, his creditor, and Ezrom by causing the securities to be transferred directly to them, gave a preference to the defendants, who are under liability for him. As I said before, the defendants had no claim on Jacob, and did not deal with him, but the form of the proceeding ought not to change the rights of the parties in equity. If the assignee of Jacob or Ezrom Mayer had questioned the transaction within four months after the adjudication in bankruptcy, they could have had it set aside on a proper case being made, but they have waited till after the four months expired, and I think are now too late. The transaction was not kept secret. The documents in question were duly recorded within a short time after their date, and the defendants have made no secret of the assertion of their rights.

It is true there is plausible ground for the argument made by complainant's counsel, that this was a fraudulent gift or grant by Jacob Mayer, within the second clause of the section, and I admit that the facts bring the transactions fairly upon the debatable ground between the two clauses. But the weight

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of evidence, I think, strongly preponderates in favor of the view I have taken.

There was a collateral issue raised in the case which has also been quite fully argued, and on which much proof has been presented. It seems that the property covered by the \$2,100 mortgage was at one time owned by Susanna Schlott, the wife of John H. Schlott, and while so owned by her, she and her husband, John H., gave a trust deed dated Nov. 16, 1867, to one Barton, to secure the payment of two notes, one for \$96.59, and the other for \$2,419.60, to Wm. B. Mayer. Afterwards, Mrs. Schlott and her husband conveyed this land to Jacob Mayer, and he conveyed it to Wm. B. Mayer, who gave the \$2,100 mortgage in question to Jacob, to secure a part of the purchase money. Complainant insists that when the fee became vested in Wm. B. Mayer, it merged the Schlott mortgage, so that the mortgage from Wm. B. to Jacob Mayer became the first lien on the property. Much evidence has been put upon the record in regard to the intention of the parties as to whether the Schlott mortgage should be kept alive, but I do not deem it necessary for me to follow out and decide these questions in the light of the proof taken and points made, because I think that when I have determined that the assignee in bankruptcy has no claim to the property, I have gone as far as my jurisdiction extends. The parties contending for this mortgage, or rather for the question of its priority, are Mrs. Mayer, wife of Wm. B. Mayer (who claims that she loaned the money to Schlott, and is now the holder of the Schlott mortgage), and the assignee in bankruptcy, and Ezrom Mayer's sureties. They are all citizens of this state and district, and when I hold that the assignee has no title, I can not retain jurisdiction to settle the controversy between Mrs. Mayer and the defendants Little, Clayton, Bartlett, and McCall.

The decree should therefore be that the bill be dismissed for want of equity, as against defendants Little, Clayton, Bartlett, McCall, and Miller; and dismissed without preju-

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dice as between these defendants and defendants Win. B. and Lucinda Mayer and Barton, touching the validity and priority of the Schlott mortgage.

Where the creditor loaned the bankrupt money to take up notes on which the creditor was liable as indorser, at the same time taking a mortgage to secure the loan: *Held*, a preference under the 35th section of the act. *Scammon, Assignee v. Cole et al.*, 3 Bankrupt Register, 100; *Cookinham v. Morgan*, 5 do., 16.—[Reporter

In re Manning.

In re WM. J. MANNING.

CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—DECEMBER, 1873.

IN BANKRUPTCY.

Where partners, in compromise with their creditors, gave their note in settlement, guaranteed by the attorney, such guarantor cannot be made a party to bankruptcy proceedings against the partners, even though, after the settlement, he became a partner.

Petition of review filed by Wm. J. Manning, against whom adjudication of bankruptcy had been entered as partner with Edmund Shanahan and James West.

Tenneys, Flower & Abercrombie, for petitioning creditors.

T. M. Manning, for petitioner in review.

DRUMMOND, J.—The only question I have considered it necessary to decide is as to the effect of the signature of Manning to the notes that were offered in evidence, which, it was contended, showed that there was a suspension of the payment of commercial paper, and a continuance of such suspension for more than fourteen days.

The petition in bankruptcy was originally filed against Shanahan and West. Afterwards William J. Manning was made a party. It was as amended filed against them all, as partners; and the question is whether the promissory notes offered in evidence showed as to Manning that it was a suspension by him as a partner of West and Shanahan and so continued for more than fourteen days, within the meaning of the bankrupt law; and I have come to the conclusion that it was not.

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Shanahan and West were partners. They got into trouble, and proceedings in bankruptcy were commenced against them. A compromise was made which was negotiated by Manning, a lawyer of this city. It was proposed that they should pay a certain percentage on their indebtedness and that time should be given them. They were unable to find the security required, and finally Manning became security; and in consequence of that arrangement a partnership was entered into between Manning, and Shanahan and West. The notes offered in evidence were the notes of Shanahan and West guaranteed by Manning, and, except one of the notes, secured by him on real estate. The notes ran in this form: "Five months after date for value received we promise to pay to the order of L. M. Bates & Co. thirteen hundred and ninety-five dollars and ninety-four cents, at the First National Bank. Shanahan & West." On the back of the note was written: "For value received I hereby guarantee the payment of the within note at maturity. William J. Manning." Now the question under the contract which Manning made with Shanahan and West, by which he became a partner and assumed and indorsed these notes, is whether this was his commercial paper, for which a suspension of payment, and non-resumption for fourteen days authorized a proceeding in bankruptcy against him. It may be a question of some nicety, but I think that it is not fairly within the true construction of the bankrupt law; that it was not such commercial paper given by him as a partner, for which as against him proceedings in bankruptcy could be commenced. He was simply an indorser or guarantor. He had nothing to do with the original consideration for which the paper was given, and there may be great doubt whether Manning, as to the notes guaranteed by him, assumed the character of a merchant, though he did as to the future by his contract of partnership. I make no decision upon any other point. I think the decree of the District Court as to Manning, was wrong. The adjudication of bankruptcy as to Manning must be set aside and proceedings dismissed as to him.

In re Manufacturers' National Bank.

In re MANUFACTURERS' NATIONAL BANK.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—DECEMBER, 1873.

IN BANKRUPTCY.

NATIONAL BANKS NOT AMENABLE TO THE BANKRUPT ACT.

1. A national bank is not liable to be proceeded against in bankruptcy.
2. CURRENCY ACT NOT REPEALED OR SUPERSEDED.—The Bankrupt Act does not repeal or supersede the provisions of the National Currency Act for winding up insolvent national banks.
3. CURRENCY AND BANKRUPT ACTS NOT CONCURRENT;—Nor can the two acts exist together, as furnishing concurrent or co-ordinate remedies. The remedies prescribed in such case under the Bankrupt Act are not so ample and complete as those under the Currency Act, and the fact that creditors can not of their own motion institute proceedings under the Currency Act does not change the construction of the acts.
4. ACTS NOT CUMULATIVE.—Nor did Congress intend to inject the provisions of the Bankrupt Act, so that creditors could apply the remedies of the one, and the Comptroller the remedies of the other. Such a construction would inevitably produce confusion.
5. REMEDIES—WHEN EXCLUSIVE.—When the legislature creates a corporation, it can also prescribe what remedies shall be had against it, and such remedies then become exclusive.

This was an application by R. J. Smith & Co., of Chicago, for a rule on the Manufacturers' National Bank of Chicago to show cause why it should not be adjudged a bankrupt.

The petitioners were creditors of the bank for money deposited in the ordinary course of business prior to its suspension of payment on the 17th day of October, 1873, and the petition was in the ordinary form, alleging suspension of payment of its commercial paper for a period of over four-

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teen days, and preferential payments made to other of its creditors.

Harding, McCoy & Pratt, and *T. C. Whiteside*, for petitioners.

Lawrence, Winston, Campbell & Lawrence, and *Ayer & Kales*, for the bank.

BLODGETT, J.—On the 15th day of November last Messrs. R. J. Smith & Co. filed in this court their petition setting forth that they are creditors of the Manufacturers' National bank, of this city, for money deposited with said bank in due course of business, and alleging that the said bank had suspended payment on its commercial paper for over fourteen days, and had, when insolvent, made preferential payments, for which acts they prayed that the bank be adjudged bankrupt.

Being aware that grave doubts had been expressed by many lawyers and business men as to the application of the bankrupt law to national banks, I directed notice of the application for a rule to show cause to be served on the officers of the bank, and have heard arguments for and against the application.

The law now in force for the organization and government of national banks was enacted on the 3d of June, 1864,¹ and has been amended by the act of Feb. 4, 1868,² the act of Feb. 19, 1869,³ the act of July 12, 1870,⁴ and the act of March 3, 1873,⁵—Embodied in the original act, are very full and ample provisions for winding up and settling the affairs of these banking associations, mainly through the federal courts. The

¹ 13 U. S. Statutes at Large, p. 99

² 15 do., 34.

³ 15 do., 270.

⁴ 16 do., 251.

⁵ 17 do., 603.

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fundamental purpose of the act and its amendments was to provide a national currency and insure its prompt redemption, and, incidentally, to provide banking or fiscal agencies through which the ordinary financial business of the country could be safely transacted.

The leading features of the system were:

1. The security of the circulating notes of those banks by the pledge of Government bonds in the hands of the Treasurer of the United States, and in case of the failure of the bank to redeem its notes, then redemption of those notes by the Government, for which it is to be reimbursed by the proceeds of the bonds deposited and a first lien on all the assets of the bank.

2. The responsibility of the stockholders of the bank to the extent of the par value of the stock held by them respectively, in addition to the amount invested in their shares.

3. The whole system to be under the surveillance of the comptroller of the currency, with full powers to examine into the affairs of each bank, and in cases of non compliance with the provisions of the law, to appoint a receiver to administer and wind up their affairs.

On the 2d day of March, 1867, Congress passed an act to establish a uniform system of bankruptcy throughout the United States; and by the thirty-seventh section of said act it is declared "that the provisions of this act shall apply to all moneyed, business, or commercial corporations and joint-stock companies," and by the third clause of the same section it is declared that "all payments, conveyances, and assignments declared fraudulent and void by this act, when made by a debtor, shall in like manner and to the like extent and with like remedies be fraudulent and void when made by a corporation or company."

The forty-eighth section declares that the word "person" when used in this act, shall be held to include and mean "corporation," and by the ninth clause of the thirty-ninth section

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it is made an act of bankruptcy for any "banker" to suspend payment of his commercial paper for fourteen days.

The bankrupt law is the latest expression of the legislative will, and its general terms and provisions must be held to repeal all previous statutes necessarily incompatible with it. The question then is, does the bankrupt law repeal and supersede the provisions in the currency act for winding up the affairs of insolvent national banks? or can its provisions be applied to those corporations and leave intact the provisions of the currency act on the same subject? There is no doubt of the soundness of the general rule of interpretation cited by the counsel for the respondent: That a statute, although so general in its terms that its letter would comprehend all classes of persons and things to which it can relate, will nevertheless be construed by the courts as not applying to a particular class which has been specially provided for and regulated by another statute relating solely to such class, if there is no language in the general statute, repealing the former statute or in any manner referring to it.¹

A thing which is in the letter of a statute is not within the statute, unless it be within the intention of the makers.²

"Where the intention of the legislature is not apparent to that purpose, the general words of another and later statute shall not repeal the particular provisions of a former one."³

The rule is thus stated in Sedgwick, on the construction of statutory and constitutional law, p. 97, (2nd ed.):

"In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule, that a general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcil-

¹ *Hume v. Gossett*, 43 Illinois, 297; *The People ex rel. v. Miner*, 46 Illinois, 384.

² Bacon's Abridgment, title Statutes, 385.

³ Dwarria on Statutes, 117, quoted from Coke.

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ably inconsistent. * * * * The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the later act such a construction, in order that its words shall have any meaning at all."

The currency act provides for the appointment of a receiver to wind up the affairs of a national bank in the following cases:

1. For not keeping good a surplus—12th section.
2. For not keeping stock at minimum—15th section.
3. For not keeping good its reserve—31st section.
4. For not selecting a place for the redemption of its notes—32d section.
5. For holding its own stock over six months—35th section.
6. For non-payment of its circulating notes—50th section.
7. For improperly certifying a check—section 1, act March 3, 1869.
8. For failure to pay up capital stock, and for allowing same to become and remain impaired by losses—section 1, act March 3, 1873.

Upon the happening of either of these contingencies the comptroller may appoint a receiver to take possession of all the books, records and assets of the corporation, who shall proceed to convert the assets into money under the direction of a court of competent jurisdiction. And the money so realized shall be paid over to the treasury of the United States, subject to the order of the comptroller, who, after deducting in full whatever amount shall be due to the United States, shall distribute the balance ratably among the creditors of the bank; the claims of creditors to be proven before the

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comptroller, or adjudicated in a court of competent jurisdiction.

By the 52d section the "application of its assets in the manner prescribed by this act, with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void."

And by the 48th section it is made unlawful for any such bank, after suffering a protest of its circulating notes, and after notice from the comptroller, to in any manner prosecute the business of banking, except to receive and safely keep its money and deliver special deposits.

And by the 53d section, any violation of the provisions of the currency act, done knowingly, by either a bank, or its officers or agents, works a forfeiture of all its rights and franchises, to be adjudged by a federal court at the suit of the comptroller.

The 8th section provides that said corporations, *i. e.*, national banks, may sue and be sued, complain and defend, in any court of law and equity as fully as natural persons.

And by the 57th section it is declared, that "suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which such association is located, having jurisdiction in similar cases." And by the amendment to this section, made by the act of March 3, 1873, it is further provided that "no attachment, injunction or execution shall be issued against such association or its property before final judgment."

I am not aware that any adjudication has yet been made, determining what is an "act of insolvency" within the intent and meaning of the 52d section, but it seems to me to be an act which shows the bank to be insolvent; such as non-payment of its circulating notes, bills of exchange, or certificates of deposit; failure to make good the impairment of

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capital, or to keep good its surplus or reserve; in fact, any act which shows that the bank is unable to meet its liabilities as they mature, or to perform those duties which the law imposes for the purpose of sustaining its credit.

It will thus be seen that while the currency act does not specify in detail, and provide for all the specific acts of bankruptcy enumerated in the bankrupt law, it yet does furnish, through the functions of an important public officer—the comptroller of the currency—a very complete and detailed scheme or plan for administering the affairs of an insolvent national bank. It is true there is no provision for an individual creditor's putting this machinery in motion. But the presumption is that Congress deemed it wiser to leave this duty to an impartial public officer rather than entrust it to the hasty, inconsiderate, and perhaps selfish action of one or more creditors. It was probably thought that the necessity of maintaining the public confidence in the system was such as would compel the comptroller to act in all cases when a bank had become derelict or discredited, and that this consideration, together with the clear obligations of duty, thrown upon the officer, would be sufficient to insure his action in all cases when he acquired the right to do so. At all events, the law as it was enacted contained ample and specific provisions for creating and managing these corporations, and for administering their affairs when they became unable or refused to perform their public functions.

The system has been in operation nearly ten years. Over two thousand banks have been organized under it. Of these, twenty-one have been wound up through the agency of the comptroller and a receiver—the great part of them since the enactment of the bankrupt law. All the legislation of Congress has looked toward the perfecting and perpetuation of the system, and ought we now to say that Congress, by the enactment of the general bankrupt law, intended to place these corporations under the provisions of that law, and to repeal the elaborate plan which it had specially furnished for

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winding up their affairs when they became insolvent or incapable of transacting banking business?

That it did not intend to repeal them, is conclusively evidenced by the fact that in two of the important amendatory acts, those of March 3, 1869,¹ and March 3, 1873, especial reference is made to those winding up provisions of the original act, and they are treated as being in full force. So, too, in several cases which have been before the Supreme Court since the enactment of the bankrupt law, reference has been made to these winding-up powers as still in force.

It being clear, then, that Congress did not intend to repeal the winding-up clauses of the currency act, the question arises; Did it intend that the two remedies, that is, the one given by the currency act and the one given by the bankrupt act, should exist as co-ordinate or concurrent remedies, and the affairs of an insolvent national bank be administered by that tribunal which first acquired control.

This construction might be admitted if the two were entirely compatible with each other, or if each was equally as complete as the other,—that is, if each could reach and administer upon all the assets of the debtor bank so as to leave nothing to be done by the other.

But we find upon examination that the important duty of paying the holders of circulating notes, and distributing the proceeds of the bonds deposited to secure them or the surplus of those bonds, and of enforcing the liability of stock-holders, is left with the comptroller, and can only be enforced by or through him. This latter point was fully discussed and decided by the Supreme Court,² where it was expressly held that the comptroller alone could enforce the personal liability clause. The court says: "The receiver is the instrument of the comptroller. He is appointed by the comptroller, and

¹ 15 U. S. Statutes at Large, 826

² *Kennedy vs. Gibson*, 8 Wallace, 496.

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the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against stock-holders to enforce their personal liability, and whether the whole or a part, and, if a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stock-holders can not controvert it.

“It is not to be questioned in the litigation that may ensue. He may make it at such times as he shall deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, when the personal liability of the stockholders is sought to be enforced, and must precede the institution of a suit by a receiver. * * * The claims of creditors may be proved before the comptroller or established by suit against the association. Creditors must seek their remedy through the comptroller in the manner prescribed by statute.”

Much stress was laid by the attorneys for petitioners upon the inadequacy of the security for creditors under the currency act, mainly because creditors could not of their own motion initiate winding-up proceedings, but how much more inadequate would the bankrupt court be to the same end if it cannot reach or distribute assets and perhaps must pay what it gets over to a government officer for distribution.

I do not say that an assignee would be obliged to pay over to the treasurer, but that there is grave ground for a claim that he should do so, and that collision might grow out of such claim.

The relief which could be afforded to the creditors of a national bank, then, being so incomplete, I cannot think it was the intention of Congress to clothe bankrupt courts with jurisdiction over this class of corporations. I have already cited the evidence which shows to my mind that Congress did not intend to repeal the winding-up provisions of the currency act by the passage of the bankrupt law, and a comparison of the provisions of the two acts show with equal clearness to

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my mind that it did not intend to inject the provisions of the bankrupt act into the currency act, so that creditors could apply the remedies of the bankrupt act, and the comptroller the remedies of the currency act; because such a construction would inevitably produce collisions and conflicts of jurisdiction, and the remedies given by the bankrupt act would be so far unavailing in regard to important assets as to make it evident that there was no intention to apply such a remedy. Suppose this court were to adjudge this respondent bankrupt to-day, and send its messenger and assignee to take possession of the assets, the officer of the court could in no event enforce the personal liability clause, or obtain possession of the Government bonds deposited to secure the circulation, or any surplus of those bonds after fully redeeming the circulation. Those assets are beyond the reach of this court or its officers, and can only be approached by the way of the comptroller and his receiver. Then why should this court take cognizance of a case that it cannot administer?

Why not, rather, say that Congress has acted upon the subject matter of insolvent national banks and made specific provisions for administering their affairs, and, inasmuch as the general bankrupt law has not expressly repealed these specific provisions nor necessarily suspended them, the courts will presume it was the intention of Congress to except this class of corporations from the operation of the later statute? Such conclusion seems to me consistent with authority, and is, in fact, the only conclusion that will not lead to inextricable complication and conflict.

But it is urged that the currency act makes these corporations liable to all suits and actions which might be brought against natural persons, and that they can therefore be proceeded against in bankruptcy.

A sufficient answer to this might be found in the fact that when the currency act was passed there was no bankrupt law in force, and therefore the general language must be held subject to this limitation. But I take it there is no doubt that

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the legislative power which creates an artificial person or corporation can also prescribe what remedies shall be had against it, and that such remedies would be held to be exclusive, and that the provisions of the general bankrupt law would not be held to apply to corporations at all but for the express terms of the act. Should they, then, be held to apply to a class of corporations which have, as it seems, a bankrupt law of their own ingrained into their own constitution and part of their organic law, by the same authority which enacted the bankrupt law? I think not. Nor does it seem to me that there is any necessary hardship in denying the remedies of the bankrupt law to the creditors of this corporation. There is no evidence that either this petitioning creditor, or any other creditor, has applied to the comptroller to take possession and administer the assets. Additional force is also given to this consideration from the fact that in the very latest amendment to the currency act it is expressly provided that no attachment, injunction, or execution, shall issue against a bank until judgment is obtained.

It is well known that in many of the states proceedings by attachment may be taken by a creditor in the first instance, and as a matter of course, and in nearly or quite all the states, attachments can issue upon affidavits showing the existence of certain facts, while injunctions are almost universally issued before judgment or decree in equity cases when a case is made for one. And yet these corporations are, probably for reasons of public policy, exempted from liability to all this class of summary proceedings. Here we have a restriction upon the powers of the bankrupt court, almost, if not wholly, incompatible with the jurisdiction. For of what use would it be to proceed in bankruptcy against a debtor, in a large number of cases, unless he could be enjoined and his property seized by process of the court. Before adjudication or judgment could be obtained, the property of the debtor might be wasted or spirited away, so that the adjudication would be barren of results.

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I do not say that the prohibition to enjoin, or attach property necessarily implies want of jurisdiction, but only that it goes far to show that it was never the intention of Congress to clothe a bankrupt court with jurisdiction as against these corporations.

I am therefore of the opinion that the rule to show cause should be denied, and the petition dismissed for want of jurisdiction.

In re WILLIAM D. FORBES.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1874.

IN BANKRUPTCY.

1. CHATTEL MORTGAGE, WHEN VOID.—A chattel mortgage authorizing the mortgagor to sell the property mortgaged is void as against creditors, and delay on the part of the mortgagee in taking possession after maturity is fatal to his rights as against creditors or purchasers. The same rules apply as against the assignee in bankruptcy.

2. POSSESSION.—When the mortgagee took possession some time after the maturity of his mortgage, and sold part of the goods mortgaged, he has no right to apply the proceeds on his indebtedness, but if he has not acted in bad faith he may be allowed to retain sufficient to cover his actual expenses in making the sales.

3. A BILL OF SALE—made after possession so taken is a preference, and cannot be used to help out the defects in the mortgage.

4. PROOF OF DEBT.—If, before the maturity of the mortgage, the mortgagor had taken in a partner, the mortgagee can only prove against the estate of the mortgagor—not against the partnership.

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5. PRACTICE.—On motion to expunge a proof of debt and claim to establish a set-off, personal judgment cannot be rendered against the creditor for money in his hands—that must be by suit against him.

D. S. Pride, for assignee.

Dent & Black, for mortgagee.

BLODGETT, J.—A question is raised in this case by way of appeal from the finding of J. A. Crain, Register, in regard to a claim made by Joseph A. Hodges. It appears from the proof in the case that on the 2d of December, 1871, said bankrupt, William D. Forbes, was engaged in business as a merchant in Lee county, in this State, having in his store a small stock of goods; that he borrowed of one Little \$1,000, for which he gave his note, due in 90 days, with said Hodges as security. And to indemnify him against loss on said note, Forbes gave Hodges a chattel mortgage on his said stock of goods, said mortgage containing the following clause: "Provided, also, that said William D. Forbes may retain the possession of and have the use of said goods and chattels until the day of payment aforesaid, rendering a true account of all sales, having the privilege of continuing the trade and sales and applying the proceeds to payment of said note according to the direction of said party of the second part and understanding of the parties hereto." And Forbes continued to sell goods from his said stock and purchasing others until about the 15th of March, 1872, when Anderson became a partner to the extent of a quarter interest in said business with Forbes, after which Forbes and Anderson purchased goods, used in their said business for which they contracted debts to an amount exceeding \$3,300, which were unpaid at the time they were adjudicated bankrupts. Default was made by Forbes in the payment of the note to Little, and on the 23d of May, 1872, Hodges paid said note, and on that or the next day he took possession of the stock of goods in the store of Forbes & Anderson by virtue, as

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he claimed, of his said chattel mortgage. Within a day or two after so taking possession, Forbes & Anderson gave to Hodges and Hiram Anderson a bill of sale of said stock of goods with the agreement that they were to sell the same and out of the net proceeds pay the debt due from Forbes to Hodges and a debt of about the same amount due from Andrew J. Anderson to said Hiram Anderson. In pursuance of said agreement Hodges proceeded to keep open the store and sell said goods in the due course of business until about the time the bankruptcy proceedings were commenced against Forbes & Anderson, when he closed the store and subsequently delivered the unsold goods to the assignee of Forbes & Anderson. The money received by Hodges for goods sold by him and outstanding accounts collected amounted to \$723.72, and he sold goods on credit to the amount of \$119.73, which is still due and unpaid to him. Hodges claims that his expenses in making said sales amounted to \$233.50, leaving in his hands \$440.23, and yet to be collected \$119.73. He now seeks to prove his debt against the estate of Forbes & Anderson for the amount paid on the Little note, and offers to set off and apply the amount so received for the goods sold by him. And the question is, Can he be permitted to do so?

Chattel mortgages containing clauses authorizing the mortgagor to sell the property mortgaged have been held void by the Supreme Court of this State in numerous cases.¹

So, too, it has been repeatedly held that delay on the part of the mortgagee in taking possession after condition broken is fatal to his rights as against creditors or purchasers.²

The note which Hodges signed fell due on the 2nd of March, 1872, and no attempt was made to take possession un-

¹ *Davis vs. Ranson*, 18 Illinois, 396; *Barnet vs. Fergus*, 51 do., 352.

² *Reed vs. Eames*, 19 Illinois, 594; *Buckley vs. Lampett*, 24 do., 604; *Barbour vs. White*, 37 do., 164.

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der the mortgage until about the 23d of May, although the condition was that the mortgagor should pay it at maturity.

This chattel mortgage was then void as against the creditors of Forbes & Anderson for the two reasons above assigned at the time Hodges took possession, and he can claim no rights under it as against the creditors of the firm. The goods mortgaged cannot be identified or separated from the goods of the firm, and the large indebtedness of the firm has been contracted upon the credit given by the possession of these goods. The bill of sale given to Hodges and Hiram Anderson, after Hodges took possession of the stock, cannot be held to supplement or help out the defects of the mortgage because it was manifestly fraudulent as against the creditors of the firm, it being clearly an attempt to prefer Hodges and Hiram Anderson who were creditors of the individual members of the firm.

The Register refused to allow the claim of Hodges as a debt against the firm and also refused to allow the retention of the \$440.23 by Hodges.

I think the Register was clearly right on both points; and the order of the court should be that the claim of Hodges against the estate of the firm should be expunged, and leave given him to prove it against the individual estate of Forbes.

So far as the money in his hands is concerned it is sufficient to say that this court can render no judgment or decree directing its payment to the assignee, but such payment must be enforced by suit if not paid voluntarily.

As the parties may, however, wish some instruction from the court as to the basis of a settlement of this claim, I will say that I think the assignee may properly allow a reasonable sum to Hodges for the care and selling of said goods, to be determined by inquiring into the facts. So far there is no allegation of bad faith against Hodges in the management of the goods or any charge that he failed to account for those he did not sell. Some expenditures by some one would be necessary to sell the goods, and if those charged by Hodges are

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reasonable they should be allowed if he has properly accounted for all the goods had by him.

See further that chattel mortgages, providing that the mortgagor may retain possession, sell and replenish the mortgaged property, are void as against creditors. *In the Matter of Manly*, 2 Bond, 261; *Steinart vs. Deuster*, 23 Wisconsin, 186. *In re Kahley*, Vol. 2 of this series, 383; *Harvey vs. Crane*, Id., 496.

But the mortgage is only invalidated as to the portion of goods permitted to be sold. *Barnet vs. Fergus*, 51 Illinois, 352. A clause in the mortgage allowing the mortgagors to retain possession and sell the goods for the mortgagee as their agents, and to account to them for the proceeds, is valid. *Hawkins vs. Hastings Bank*, 1 Dillon, 462.

Independent of any statute a mortgage is void as to creditors if the mortgagor is allowed to retain possession and sell the property as his own, and a mortgage fraudulent and void as to creditors is equally so as to the assignee in Bankruptcy. *In re Morrill*, 8 Bankruptcy Register 117.—[Reporter.]

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In re BANK OF MADISON.

DISTRICT COURT.—WESTERN DISTRICT OF WISCONSIN.—JANUARY, 1874.

IN BANKRUPTCY.

1. **RELATION OF BANK TO CUSTOMERS.**—The relation between a bank and its customers is that of simple debtor and creditor—not principal and agent—and does not partake of a fiduciary character.

2. **COLLECTIONS.**—A note deposited for collection, and passed to the credit of the depositor, becomes the property of the bank, and on the bankruptcy of the bank, the proceeds go to the general creditors. The fact that the account was made good before the collection of the note does not make the bank a trustee as to the proceeds.

3. **BURDEN OF PROOF.**—A customer of an insolvent bank must make out a very clear case, before the court will allow payment of his claim in full.

4. **COSTS.**—Where a petition to establish a right to payment in full has assumed the form of a regular suit, costs and a docket fee may be taxed against the petitioner.

This was a petition by the Madison Manufacturing Company, praying that the assignee may be ordered to pay over five hundred and seventeen dollars and forty cents, claimed to belong to said company. On the 18th day of August, 1873, the said company took a note of E. W. Skinner, for five hundred dollars, due in September, to the bank for collection and got it discounted, and the proceeds passed to its credit on the bank books. The company's account was then overdrawn to an amount exceeding the avails of the note thus passed to its credit. The company indorsed the note in the usual form, and the bank transmitted it to its correspondent in Sioux City, Ia., for collection. Not being paid at maturity, it was protested. It was, however, finally paid in installments, and the proceeds transmitted, as paid, by drafts on

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the Third National Bank of Chicago, which were received after the bank had virtually suspended payment.

The Manufacturing Company, before the commencement of proceedings in bankruptcy, demanded the drafts, but the bank declined to give them up, and they were delivered up to the assignee after his appointment. Without the credit of the note the company's account remained overdrawn until the 6th of September. Deposits were made from other collections from time to time thereafter, so that when the drafts for this note were received the bank, exclusive of this credit, was indebted to the company.

On the part of the company, it was shown, on the hearing, that the note was taken there for collection, and that the transaction took the form of a transfer, for the purpose of facilitating the collection, and that it was agreed or understood that the company was not to draw against the credit until it was collected.

Smith & Lamb, for petitioner.

H. S. Orton and *Wm. F. Vilas*, for assignee.

HOPKINS, J.—Notwithstanding the special circumstances shown by the petitioner, the fact, nevertheless, remains, that the note was credited to the company in the ordinary way, and subject to its order, like any other deposit, and the company had the benefit of it in the payment of its overdrawn account at the bank from the 18th of August to the 6th of September. The note and the avails belonged to the bank, during that period, at least, and if the note had been collected during that time the company would not have been entitled to these drafts, or the avails of the note. That being so, has the company, by making good its account on the 6th of September, in the ordinary way of depositing, without any special agreement to that effect, changed its relation or condition so as to be entitled to the drafts as the proceeds of the note? And, further, does this case fall within the law gov-

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erning or relating to principal and agent, so as to authorize the company, as principal, to follow the proceeds and reclaim them from the hands of the assignee in this manner?

In case of the insolvency or bankruptcy of an agent, property consigned to him to sell, and notes left with him to collect, and the proceeds of such, whether in notes or money, so long as the same can be distinguished from the mass of the agent's or factor's property, do not pass to the assignee in bankruptcy, and if received by them may be recovered by the principal at law, or, in other words, the right of the principal thereto ceases only when the means of ascertainment or identification fail.

The petitioner's counsel contended for the application of this doctrine to this case, and claimed that no property or choses in action held by the bankrupt in a *fiduciary* capacity passed to the assignee, citing, in support thereof, *Price vs. Ralston*, 2 Dallas, 60; *Denston vs. Perkins*, 2 Pickering, 86; *Taylor vs. Plumer*, 3 Maule & Selwyn, 562; 3 Parsons on Contracts, 478, *et seq.*; *Rodriguez vs. Heffernan*, 5 Johnson's Chancery, 417.

As to the correctness of these general principles there can be no question. But for the decision of this case it becomes necessary to ascertain the nature of the business between bankers and their customers, and to see whether such business comes within these principles; if not, then we must look in some other rule for its determination.

In deciding this case, it must be borne in mind that the petitioner was a customer of this bank, and that the relation of banker and customer existed between him and the bank, and as a regular dealer with the bank, he had an open and running account, in which he was credited with all sums paid into the bank, and with the proceeds of all notes and bills discounted or collected, and was charged with all checks drawn on the institution. In *in re Franklin Bank*, 1 Paige, 249, 254, the Chancellor says, Whenever money is specially deposited in a bank for safe keeping, it is at the risk of the depositor. If the

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same is stolen, lost or destroyed without the fault of the bank or its officers, the depositor sustains the loss. Not so with a general depositor. The money, checks, or bills which he deposits, become the property of the bank, and he becomes a creditor; he has no claims upon the money or bills deposited. The officers may use them as they please, and he is to all intents a general creditor of the bank, and the bank may use them as it sees fit, and there is an implied assent to such use by the depositor. According to that doctrine, the relation of a bank with its dealers and depositors is that of an ordinary debtor, and must be governed by the law relating to transactions between debtor and creditor.

In *Smedes vs. Bank of Utica*, 20 Johnson, 372, which was an action for damages against the bank for omitting to duly present and protest a note left with it for collection, the bank set up a want of consideration for its undertaking to collect the bill. Woodsworth, J., who delivered the opinion of the court, page 379, says: "It will be conceded that had this been an undertaking by an individual to demand payment and give notice, it would be a *nudum pactum*; * * * but the case of banking institutions is widely different. They are established to aid the commerce of the country, by giving facilities to the moneyed corporations of the community, *

* * to enlarge the amount of actual capital. * * * The operations of a bank principally consist in loaning money and discounting notes, which are direct and immediate sources of profit. Incident to the business of a bank is the receiving of notes from their customers for collection; when paid, the money is placed to the credit of the depositor, and remains in bank until called for." And as profits might arise from such a transaction and deposit, it was held a sufficient consideration for the defendant's undertaking to collect the note. I cite this to show the great dissimilarity between the way an agent transacts the business of his principal, and the duties and obligations assumed by an agent towards his principal, and the way a banker deals with his customers, and

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the duties of such banker, in reference to the money collected for or deposited by his customers. It is the duty of an agent to pay over the money received or collected by him to his principal, not to use it for his individual benefit; whereas, there is an implied understanding that a banker may use and loan for the benefit of the bank the money of his customers, including that collected for them as well as that deposited.

That case shows, further, that there is an implied understanding that the money to be received from collections is to go on deposit in the bank, and in the absence of proof of an agreement that it was not to be passed to the account of the dealer, courts should give to such understanding the force of a contract that it was to be deposited in the ordinary way, and to be drawn out by checks as other money. Indeed the proof here is that the proceeds were to be deposited. The relation between bankers and their customers is most clearly laid down and defined in the case of *Foley vs. Hill*, 2 House of Lords Cases, 28, decided in July, 1848. It is there held to be the ordinary relation between debtor and creditor, with a superadded obligation to pay the customer's checks on demand, and it is there further held that it does not bear any analogy to the relation between principal and agent or factor, and does not partake of a fiduciary character. It is there said, that "money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him, when he is asked for it. * * * He is guilty of no breach of trust in employing it; * * * he is not bound to keep it or deal with it employing it as the property of his principal; * * * he is simply required to refund an equivalent sum."

That case distinguishes the relation of bankers and their customers from that of principal and agent, and shows that the obligations incurred by a banker, in the ordinary course of his business as such, with his customers, is not fiduciary

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in its nature, but, on the contrary, the liability is that of an ordinary debtor.

The case of *Smedevs. Bank of Utica, supra*, holds, what we all know to be the fact, that the collection of notes is, in this country at least, a part of the ordinary business of a banker. Hence it follows that a banker, in receiving a note for collection from one of his customers, does not act as an agent, but is presumed to have undertaken the collection for the profit that might result to it from the deposit and use of the money as a banker. So that when a banker collects money for his dealers it is regarded as deposited and in the light of any other deposit, not as the money of the customer, nor is the customer entitled to it, but only to its equivalent as any other deposit.

This, it seems to me, is an answer to the claim of the petitioner in this case. These authorities show that the principle upon which the counsel rested the claim upon the hearing is not applicable, and cannot be invoked to authorize a recovery of this claim. But as hereinbefore stated the testimony does not sustain the position insisted upon, to wit.: that the note was taken simply for collection. I think the transaction in its legal aspect widely different from such a case.

The note was, in fact, discounted, and the proceeds deposited and credited to the petitioner, and up to the time that its account was made good, belonged to the bank, and I cannot believe that the making good of the account afterwards changed the relation between the parties in contemplation of law. To grant the relief asked would be, in fact and in legal effect, paying the subsequent deposits of the petitioner in full. To do this under so thin a disguise as that put forth, to wit.: that the petitioner was not to draw from the funds until after the collection of the note, when at the time the account was overdrawn to an amount exceeding the proceeds, would be sacrificing the substance to preserve the shadow.

One of the cardinal doctrines of a court of equity is that equality is justice, and in all cases in bankruptcy, whether

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heard in this court sitting in bankruptcy, or a court of equity, a creditor who claims a preference must show a clear legal right to it. Cases of extreme hardship cannot but exist in all cases of bank failures. In such failures the loss generally falls upon those least able to bear it—upon the poorer classes and laborers, the aged and dependent, the friendless and unprotected, whose little all has been left on deposit without the thought of the possibility of losing it, and who are wholly unprepared for such an event.

And it is not exacting too much to require that a party dealing with the insolvent bank in the ordinary way, as the case shows the petitioner was, should make out a very clear case before a court should sustain a preference in favor of such parties over the other creditors.

The petitioner, in order to avoid the effect of the overdraft, proved by Mr Hudson, the superintendent, that he had, standing in his individual name and as his own money, more than enough to balance the deficiency in the company's account, and that he had previously told the bank officers that his account should stand as a guaranty for any amount due from the company. This I have disregarded altogether, for the reason that, if he had so stated, it would be void under the statute as being a promise to pay the debt of another, and not in writing. The bank charged the company with the money, and his undertaking, if made as he said, would be collateral and void under the statute, for the reason above stated. I therefore deny the prayer of the petition, and, as this matter has assumed the form of a regular suit or proceeding, and testimony been introduced as upon an ordinary trial, I think it just and proper that the petitioner should pay the costs to be taxed, including a docket fee of twenty dollars, to the attorneys of the assignee.

Many of these principles apply to the case of J. H. Rountree, who has filed and submitted a petition praying that the assignee be ordered to refund to him the amount of a draft drawn by J. Hodges & Co. upon the Second National Bank

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of Chicago, for forty-two dollars and forty cents, made payable to H. H. Rountree, his son, a minor, then a student in the University at Madison. The draft was dated on the 20th of September, 1873, and was presented to the bank to be cashed, and, as alleged in the petition, was not cashed, but was taken to be collected.

The bank received it to collect, and sent it forward, and the amount thereof, instead of being returned, was credited to the Bank of Madison by the Second National Bank, which was then a creditor of the Bank of Madison to quite a large amount, so, in point of fact, neither the bank nor assignee ever received the money upon it. The Second National paid it by crediting the overdrawn account of the Bank of Madison with the amount.

The officers of the bank must have known such would be the result when they received it to collect, and their conduct in so doing is deserving of the severest censure.

These facts are a sufficient answer to the petition of Mr. Rountree, and the prayer of his petition is therefore denied. But as no counsel were employed, or argument had by either party, no costs are charged to either party in his case.

In re Martin Prescott.

In re MARTIN PRESCOTT.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—JANUARY, 1874.

IN BANKRUPTCY.

1. A creditor offering to prove a debt against a bankrupt estate stands in the position of a plaintiff at law, and in Illinois if his debt is usurious, forfeits the whole interest.

2. The assignee can take advantage of usury, and the defense is good so long as any part of the principal debt remains unpaid.

This was an exception by the assignee in bankruptcy of Martin Prescott to the decision of the register allowing the claim of J. W. Lawrence for \$3,300.

This claim was made up of two items. 1. A note for \$300, which Lawrence had signed as surety with the bankrupt, and afterwards paid. 2. A claim of \$3,000 for money loaned by Lawrence to the bankrupt at different times, on which he had received interest at the rate of two per cent. per month. The total amount of interest paid was \$1,500.

The statute of Illinois regulating the rate of interest is as follows: "If any person or corporation in this state shall contract to receive a greater rate of interest than 10 per cent. upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation."¹

¹ 1 Gross, 371, § 11.

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E. Stanford, for assignee.

Hutchinson & Luff, for creditor.

BLODGETT, J.—When a creditor seeks to prove a debt against the estate of a bankrupt, he stands in the position of a plaintiff in a suit at law seeking to enforce such claim.¹

By the 3d section of the act of the legislature of this state, approved January 31, 1857, regulating rates of interest to be paid, which act was in force at the time of the transaction in question, any agreement to pay a greater rate of interest than ten per cent. works a forfeiture of all interest.²

The Supreme Court of this state has construed this statute, holding that if the party who took usury is seeking to enforce his claim by suit, he forfeits all interest.³

It is very clear to me that Mr. Lawrence must be held by this court to be in the same position as if he had brought suit to recover this demand for \$3,000 money loaned, to which the assignee may set up any defense that Prescott could have set up if bankruptcy had not intervened.

The defense of usury can be pleaded so long as any part of the debt for which the usury was paid, or agreed to be paid, remains unpaid.⁴

In the light of the rules laid down in these cases, there can be no doubt that the facts in this case show that Lawrence has given \$1,500 for usurious interest on this \$3,000 loan, and that the same should be applied to the extinguishment of the principal debt.

This case is widely different from those cases where a debt-

¹ *In re Pittock*, 8 Bankruptcy Register, 78.

² Session laws of 1857, p. 46.

³ *Snyder vs. Griswold*, 37 Illinois, 216; *Cushman vs. Sutphen*, 42 Illinois, 256.

⁴ *Farwell vs. Meyer*, 35 Illinois, 40; *Booker vs. Anderson*, 35 Illinois, 66; *Saylor vs. Daniels*, 37 Illinois, 331; *Parmeles vs. Lawrence*, 44 Illinois, 405.

In re Martin Prescott.

or has sought relief in a court of equity from a usurious contract. In such cases, the courts, acting upon the principle that he who seeks equity must do equity, have generally required the payment of interest at the rate fixed by law where there was no special contract. Here the party seeks to enforce a contract on which he has received a large amount of usurious interest, which the debtor or his assignee may set off against the debt.

The exceptions to the finding of the register, so far as this \$3,000 demand is concerned, will be sustained, and an order entered that the sum of \$1,500 be deducted therefrom, leaving the claim fixed by the finding of this court on the facts at \$1,800 instead of \$3,300.

In re Poleman.

In re POLEMAN.

DISTRICT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY, 1874.

IN BANKRUPTCY.

1. **HOMESTEAD EXEMPTION.**—A bankrupt is entitled to a homestead exemption in property occupied by him as a homestead, even though he had previously waived his homestead rights in favor of a particular creditor.

2. **WAIVER.**—Such waiver only applies to persons claiming under the instrument in which the waiver was made, and does not inure to the benefit of the assignee or other creditors.

3. **PRACTICE IN SETTING ASIDE HOMESTEAD.**—In Illinois, where the equity of redemption is less than one thousand dollars, the property should be set aside by the assignee as a homestead; where it exceeds that sum, the assignee should sell the property and pay the bankrupt one thousand dollars in cash from the proceeds, unless the property is susceptible of division so as to set apart the homestead.

This was an exception by William C. Poleman to the decision of the register sustaining the objections to the setting aside by the assignee of the bankrupt's homestead.

At the time of the filing of the petition in bankruptcy, Poleman was the owner of certain real estate in Chicago, occupied by him as a homestead, on which he had given a trust deed to Baird & Bradley, to secure the sum of \$3,500, and also a mortgage to D. Boynton to secure the sum of \$2,250, in both of which the bankrupt and his wife had waived their homestead rights under the statute of the state of Illinois.

The bankrupt applied to the assignee to have this property set aside as exempt, to which Carson, Pirie & Co., creditors, objected, claiming that the property was worth one thousand dollars or more, over and above the incumbrances, and that

In re Poleman.

the bankrupt having once waived his homestead rights, could not claim them as against his general creditors.

The assignee refused to set aside the property.

Rufus King, for bankrupt, cited the following authorities:

Section 14 of the bankrupt act; *In re Griffin*, 2 Bankruptcy Register, 85; *In re Hester*, 5 do., 281; *In re Stevens*, Id., 298; *Cox vs. Wilder*, 7 do., 241; *Bartholomew vs. West*, 8 do., 12; *In re Jones*, 4 Chicago Legal News, 66.

Holmes, Rich & Noble, for creditors, cited.

In re Whitehead, 2 Bankruptcy Register, 181; *In re Jaycox and Green*, 7 Bankruptcy Register, 318; Section 20 of the the Bankrupt Act; *Smith vs. Kehr*, 7 Bankruptcy Register, 97; *Cox vs. Wilder*, 5 do., 443; *Cox vs. Wilder*, 7 do., 241.

BLODGETT, J.—I have examined the questions presented by the objections to the setting aside by the assignee of the bankrupt's homestead, and am satisfied that they can not be sustained, although the bankrupt and his wife waived their homestead rights in the mortgages to Baird & Bradley and Mr. Boynton; yet those waivers can only be taken advantage of by persons claiming under or through those incumbrances. A waiver by the bankrupt of his homestead rights in favor of a particular creditor, does not confer upon his general creditors any special rights, nor operate in their favor; and where, as in this case, the assignee does not claim under these mortgages or either of them, it is as to him precisely the same as though he had never waived his homestead rights, and he is entitled to have his homestead set aside under the bankrupt act. The homestead law can not receive any such narrow or critical construction as claimed by the objecting creditors in this case. The Illinois homestead statute has already received from the Supreme Court of this state, whose decisions upon this question should be followed in this court, a liberal and broad construction for the benefit not only of the owner of the property, but of his family.

In re Poleman.

The exceptions are therefore sustained, and the order will be that the assignee allow the bankrupt a homestead exemption out of the real estate held and occupied by him as a homestead, to the extent of one thousand dollars. And if the equity of redemption in the property is thought by the assignee to be worth more than one thousand dollars, that the assignee may take measures to sell the property and pay the bankrupt from the proceeds the sum of one thousand dollars in cash, unless the situation of the property be such that a homestead can be set apart without injury to the rest of the estate.

The decisions of the Supreme Court of Illinois, so far as affecting the question under consideration above, are as follows: *Moore vs. Titman*, 83 Illinois, 358; *Booker vs. Anderson*, 85 Illinois, 66; *Moore vs. Dixon*, Id., 208; *Wing vs. Cropper*, Id., 256; *White vs. Clark*, 86 Illinois, 285; *Silsbe vs. Lucas*, Id., 462; *Ives vs. Mills*, 87 Illinois, 78; As to the excess over \$1,000: *Blue vs. Blue*, 88 Illinois, 9; *McDonald vs. Orandall*, 43 Illinois, 281; *Hume vs. Gossett*, Id., 297.—[Reporter.

Sykes vs. Hayes.

MARTIN L. SYKES vs. THOMAS HAYES.**CIRCUIT COURT.—NORTHERN DISTRICT OF ILLINOIS.—FEBRUARY, 1874.****SQUATTERS—EJECTMENT.**

1. The owner of the fee can maintain ejectment against a squatter who has neither claim nor color of title.
2. Where the squatter had admitted title in the plaintiff's grantor, it is not necessary that the plaintiff produce other evidence of title than the conveyance from his grantor.

This was an action of ejectment for certain lots in Walker's Dock Addition to the city of Chicago, which plaintiff claimed in fee. The plaintiff, to maintain his title, called as witness Samuel J. Walker, who testified that ten or twelve years ago he and a man named Geer owned a large tract of land, including the lots in question; that about the time mentioned he purchased Geer's interest; that about the time he bought out Geer he went upon the land in question, and found defendant residing there; asked defendant who owned the land, to which defendant replied that it was Mr. Geer's land; witness then told him he had bought Geer's interest, and then owned the land, to which defendant replied in substance that he had *squatted* there, and would leave when witness wished him to; that witness had frequent conversations afterwards, and from year to year, with defendant, in which defendant always said he was ready to leave the lots whenever witness gave him notice to do so; that he had no rights there, or words of that import. Witness also testified that he had paid all taxes on the land for upwards of twelve years, and had platted and subdivided the same out into lots and

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blocks. Plaintiff then introduced a deed from Samuel J. Walker to plaintiff, dated Nov. 10, 1871, conveying to plaintiff the lots in question in fee simple; and also proved a demand of possession and notice to quit served on defendant, several months prior to the commencement of this suit. He also proved that he had notified defendant that he, plaintiff, had a deed from Walker, and rested his case.

Defendant was then sworn, and testified that he entered upon the lots in question and built a "shanty" about fourteen years ago; that it was then a naked prairie, and he didn't know who owned it; denied that he had ever told Walker that he would leave on request or notice, but admitted that he had always been willing to leave when the owner required him to, and would show a title; claimed no title himself; was a mere squatter, and had never paid any taxes or assessments on the land; had understood, for many years, that Walker claimed to own the land, but Walker would not show him any deed; had never paid any rent to Walker or any one else, nor agreed to pay any.

W. T. Burgess, for plaintiff, citing *Jackson vs. Denison*, 4 Wendell, 558.

R. H. Forrester, for defendant, claiming that the plaintiff could not recover unless he showed that the relation of landlord and tenant existed between the parties.

BLODGETT, J., charged the jury:

That if they believed, from the evidence, that defendant was in possession of the premises in question as a mere squatter, without any claim or color of title; that he had admitted to Walker that he, Walker, was the owner of the premises, and promised to surrender possession to Walker when notified or requested to do so; that Walker had conveyed his title to the land to plaintiff, and plaintiff now held the same, and that plaintiff had notified defendant of his

Sykes vs. Hayes.

title from Walker, and demanded possession; then plaintiff is entitled to recover on this action, according to the terms of his title deed, without producing Walker's paper title; that the admission of Walker's ownership of the property, if the jury believed such admission to have been made, was sufficient evidence of title in Walker to sustain the action so long as defendant set up no title and showed no ownership in himself; that the credibility of witnesses was for the jury, and they must determine from all the circumstances, and appearance of the witnesses, Walker and Hayes, which they would believe upon points where they contradict each other.

Verdict for plaintiff.

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ABANDONMENT.—*See* ADMIRALTY, 13

ABATEMENT.—*See* PRACTICE, 28, 80, 81.

ACKNOWLEDGMENT.—*See* REAL ESTATE, 18, 14.

ADMIRALTY.—*See* NAVIGATION.

1. **COLLISION.—DUTY OF PURSUING STEAMER.**—Where two steamers are going in the same direction, it is the duty of the pursuing boat to avoid the other. *The W. H. Clark*, 295.
2. **DUTY OF LEADING STEAMER.**—This rule, however, does not justify the leading vessel in suddenly changing her course so as to embarrass, or throw herself across the track of the other. *Id.*
3. **DISTANCE TO AVOID COLLISION.**—Where there is no opportunity of passing, the pursuing boat should keep such a distance as to avoid all possibility of a collision. *Id.*
4. **STEAMER LIABLE—NOT RAFT IN TOW.**—When the colliding boat has a raft in tow, the boat is liable, not the raft. *Id.*
5. The boat furnishing the motive and directing power, having the pilot in the pilot-house, and giving the signals to the crew, must be held responsible for the proper management of the raft. *Id.*
6. **CHARGING TO RAFT EXPENSES OF STEAMER DOES NOT CHANGE RULE.**—The fact that the expenses of the boat and its officers were charged to the raft, and that the owners of the raft employed the boat, is not material. This is a proper method of keeping the accounts, and does not affect the maritime relations of the boat and raft. *Id.*
7. **ADMIRALTY JURISDICTION OVER RAFT.**—*It seems*, that admiralty jurisdiction could not be sustained against a raft. *Quare. Id.*
8. **REPAIRS ON OLD VESSEL.**—Full charges for repairs should not be allowed when the boat was old and somewhat decayed. *Id.*
9. **AMOUNT ALLOWED.**—The party repairing should show positively that he has only reinstated the vessel in the condition she was before the collision. *Id.*
10. **COMPENSATION FOR TIME.**—The full amount which she might have earned should not be allowed as compensation for time lost. *Id.*
11. **COLLISION—RULE OF DAMAGES.**—To a libel for collision, it is not a sufficient defense to set up that a sound boat would not have sustained any damage from the collision. Such allegation is mere conjecture. *The Sam Gaty*, 190.
12. The proper rule of damages is to allow the expense of raising the

ADMIRALTY—Continued.

vessel and putting her in repair, with a reasonable allowance for loss of time and freight, and damage to the cargo. *Id.*

13. **ABANDONMENT BY OWNER.**—Where the owner had, after collision, allowed the boat to lie until she became worthless, he can only recover under the above rule. He has no right to abandon the vessel and claim a total loss. *Id.*
14. **ESTIMATED DAMAGES.**—Where, in such case, the only evidence introduced was as to the total value of the boat, the court may either allow nominal damages, or estimate them from the court's knowledge of such cases and the general facts proven. *Id.*
15. **DUTY OF APPROACHING TUGS.**—Where tugs are approaching on converging lines, and one gives the signal to pass a-larboard, to which the other answers that she means to pass a-port, and the first repeats her signal, the first has not the right to presume from a failure to answer her second signal that the other has yielded her course, but should proceed cautiously, and not run across the lines of the other. She must take notice of the fact that there is danger of a collision, even though the other tug may be in the wrong place and on the wrong course. *The Louis Dole*, 172.
16. **WHERE RIVER BEGINS.**—The rules of river navigation apply with full force on the Chicago river to the extremity of the pier. *Id.*
17. **RULE OF THE RIVER.**—Outgoing tugs should keep south of the center of the channel, and incoming tugs to the north of it. A tug going out along the North Pier is in the wrong place, and chargeable with the consequences. *Id.*
18. **RELATIVE LIABILITY OF TUG AND TOW.**—The captain of a tug is bound to know the sailing qualities of a vessel which he had towed into a harbor on several previous occasions. *The Tug Margaret*, 352.
19. He is also bound to know the condition of the harbor, the effect of the wind and waves, and the necessary course to safely enter the harbor. *Id.*
20. Though the tow should be properly steered and follow in the wake of the tug, the responsibility as to the mode, manner and speed of entrance, and the course pursued, is with the tug. *Id.*
21. **CLAIMS OF CAPTAIN.**—The contract of the captain of a vessel for his services is a personal contract, and he has no maritime lien for his compensation as such. *The Monongahela*, 181.
22. His claims for advances for board of crew and purchase of supplies may, however, be allowed out of proceeds in the registry. *Id.*
23. **CAPTAIN HAS NO LIEN—SERVICES AS CLERK.**—It being a well-established rule in admiralty that the contract of a captain is personal, and that he has no lien for his services, he cannot maintain a libel for additional services as clerk or manager without showing a special contract designating the extra compensation to be paid him as such. *The Gate City*, 200.

ADMIRALTY—Continued.

24. **EFFECT OF SALE OF CLAIMS.**—The lien of a mariner is strictly personal, and if he reduces it to common-law judgment, which he sells, no libel can be maintained thereupon, either by himself or for the benefit of the assignee. *Id.*
25. **BOAT USED FOR FERRY.**—A vessel plying between several points on the Mississippi river, on opposite sides, and within a distance of six miles, is amenable to the admiralty, even though her main business be that of a ferry-boat between points on opposite sides of the river. *Id.*
26. **EFFECT OF FERRY FRANCHISE.**—The fact that such boat was owned and run by a company possessing a ferry franchise does not change the character of the service. *Id.*
27. The width of a stream or length of a voyage is no criterion by which to determine the character of the service nor the question of admiralty jurisdiction. *Id.*
28. **WAIVER OF MARITIME LIEN.**—A mariner's lien will not be considered as waived by anything less than an express contract. Attaching the vessel under a state law, and settling that proceeding on receiving notes secured by a mortgage on the vessel, which afterwards became worthless, does not constitute a waiver of the maritime lien. A libel may still be sustained, and the decisions as to waiver of the liens under state statutes are not applicable. *Id.*
29. **DUTY OF A MATE—LIEN—CLAIM ON DEATH OF OWNER.**—A mariner can maintain his libel against the vessel, though the captain be the owner, and die during his service. He is not bound to take any notice of the ownership of the vessel nor to follow the estate of the owner into the probate court. *The Fanny Gurdner*, 200.
30. **DUTY ON DEATH OF CAPTAIN—COMPENSATION.**—A mate who takes command on the death of the captain, is entitled to maintain a libel for the entire voyage at his contract price as mate. It is an incident to his contract as mate that it may become his duty to take command, and in that event, he neither loses his lien nor becomes entitled to master's wages. *Id.*
31. **LIEN FOR WAGES.**—Seamen have a lien on the freight and cargo for their wages, and where the charterer of the vessel is also the owner and consignee of the freight, the lien nevertheless attaches, and the freight will be the amount which the transportation was fairly worth. *The Clayton*, 162.
32. **LIBEL BY INSURER.**—In case of a total loss of a cargo by collision, a libel may be brought by the insurer against the colliding vessel, after notice and proof of the loss and demand of payment, though without actual payment. *The Manistee*, 381.
33. **WHEN WILL LIE, THOUGH LOSS NOT ACTUALLY PAID.**—The insured having been fully satisfied for the loss, and not intervening or opposing the prosecution of the libel of the insurer, the carrier cannot

ADMIRALTY—Continued.

- be permitted to raise the objection of non-payment of the loss before libel brought. *Id.*
84. **POLICY ISSUED IN DISREGARD OF STATUTORY REQUIREMENTS.**—Where the statutes of a state require foreign insurance companies to comply with certain requirements, and declare penalties for doing business in disregard of these requirements, in a case of a loss on a policy issued in disregard of such requirements, a carrier cannot be permitted to make this a defense to a libel, the loss having been paid by the company. *Id.*
85. **SEIZURE.**—A libel of information against a steam vessel, to recover the penalty for not being inspected according to the Act of Congress, to provide for the better security of life on board of vessels propelled in whole or in part by steam, cannot be sustained, if a subsisting seizure of the vessel at the time the libel is brought is not alleged, and which is to be proven at the hearing. *The Tug May*, 449.
86. **STEAM-TUG INSPECTION.**—A steam-tug employed in towing rafts and lumber on a river exclusively within the state is not a common carrier nor liable to seizure for not having been inspected. *The Tug Oconto*, 460.
87. A seizure must be alleged in order to give the court jurisdiction. *Id.*
88. **DEMURRAGE.**—Damages in the nature of demurrage are recoverable from consignee without stipulation in bill of lading. *Fulton vs Blake*, 371.
89. **REASONABLE TIME—CUSTOM OF CHICAGO.**—What shall be deemed a reasonable time must always be a question of fact, to be determined by the circumstances of each case. By the custom of the port of Chicago, one day is allowed the consignee to provide a dock, and this custom, unless rendered unreasonable by controlling circumstances, should be considered a law. *Id.*
40. **DUTY OF CONSIGNEE.**—A consignee is bound to give only such dispatch as is reasonable under the circumstances. *Id.*
41. Consignees must provide such reasonable dock-room as their business ordinarily requires. *Id.*
42. **DOCK ROOM.**—A consignee who has provided sufficient dock room for vessels as they arrive, is not at fault when, from causes over which he has no control, they all arrive together. He is not obliged to procure other docks; vessels must await their turn at consignee's dock. *Id.*
43. If a consignee had provided ample docks for the accommodation of vessels consigned to him in their order, vessels arriving out of the time when they ought reasonably to have been expected must await their turn. *Id.*
44. **DUTY OF SHIP OWNER.**—A ship owner who provides a sea-worthy vessel properly equipped, and commanded by competent officers, has discharged his duty towards the subordinates, and cannot be held

ADMIRALTY—Continued.

liable for mere neglect of the officers. *Malone vs. Western Transportation Co.*, 315.

AGENCY.—See PRINCIPAL AND AGENT.

APPEAL.—See PRACTICE, 13.

ASSIGNEE.—See PAYMENT.

ASSIGNEE IN BANKRUPTCY.—See BANKRUPTCY, 37-42.

ASSIGNMENT.—See PRACTICE, 12.

ATTACHMENT.—See CHANCERY.

BANKRUPTCY.—See BANKS AND BANKING, 1-3.

1. **NATIONAL BANKS NOT AMENABLE TO THE BANKRUPT ACT — CURRENCY ACT NOT REPEALED OR SUPERSEDED.**—The Bankrupt Act does not repeal or supersede the provisions of the National Currency Act for winding up insolvent national banks. *In re Manufacturers' National Bank*, 499.
2. **CURRENCY AND BANKRUPT ACTS NOT CONCURRENT.**—Nor can the two acts exist together, as furnishing concurrent or co-ordinate remedies. The remedies prescribed in such case under the Bankrupt Act are not so ample and complete as those under the Currency Act, and the fact that creditors cannot of their own motion institute proceedings under the Currency Act does not change the construction of the acts. *Id.*
3. **ACTS NOT CUMULATIVE.**—Nor did Congress intend to inject the provisions of the Bankrupt Act, so that creditors could apply the remedies of the one, and the comptroller the remedies of the other. Such a construction would inevitably produce confusion. *Id.*
4. **REMEDIES—WHEN EXCLUSIVE.**—When the legislature creates a corporation, it can also prescribe what remedies shall be had against it, and such remedies then become exclusive. *Id.*
5. **COMMERCIAL PAPER DEFINED.**—A note given by a merchant for money loaned, is "commercial paper" within the meaning of the Bankrupt Act. The term means negotiable paper given in due course of business, whether the element of negotiability be given it by the law merchant or by statute. *In re Sykes*, 113.
6. **REFUSAL ON GROUND OF VALID DEFENSE.**—A refusal by a debtor, acting in good faith, under the advice of counsel, to pay his note on the ground that he had a valid defense, is not an act of bankruptcy. *Id.*
7. **ADVICE OF COUNSEL.**—So, if the debtor is in good faith advised by counsel that the holder has not a good title to the note, his refusal to pay it is no act of bankruptcy. *Id.*
8. **UNACCEPTED PROPOSITIONS NO ESTOPPEL.**—Nor does the fact that offers and propositions for the payment of the note had been made, necessarily preclude him from making his defense. *Id.*
9. **PROOF OF ACTS OF BANKRUPTCY CONFINED TO ALLEGATIONS.**—The proof must be confined to the acts of bankruptcy charged in the pe-

BANKRUPTCY—Continued.

- tion; nor can a refusal at a date prior to that stated in the petition be shown in evidence. *Id.*
10. **ACTUAL SOLVENCY—HOW MATERIAL.**—The fact that the maker is actually solvent and met all his other paper promptly, is a proper element as rebutting any presumption of refusal on the ground of insolvency. *Id.*
 11. **PROCEEDINGS IN SUIT AT LAW.**—A stipulation in a suit at law upon a note, giving time to plead, does not operate as an extension of time upon the note, as against the Bankrupt Act; but the proceedings in such suit may be given in evidence in determining the good faith of the defense. *Id.*
 12. **SUSPENSION OF PAYMENT—SINGLE NOTE SUFFICIENT.**—The non-payment by a merchant for fourteen days, without legal excuse, of a single piece of commercial paper, is an act of bankruptcy without reference to whether he is actually insolvent. *In re Guy Wilson*, 887.
 13. **SOLVENCY IS NO ANSWER.**—It is no answer to a petition in bankruptcy that the respondent is solvent, and the only justification for non-payment of commercial paper is a legal one, as that he was not liable upon it. *Id.*
 14. One of the objects of the bankrupt law was to compel merchants to pay their commercial paper as it fell due, under penalty of being adjudged bankrupt, if non-payment was continued without legal excuse for fourteen days. *Id.*
 15. **PRIMA FACIE CASE SUFFICIENT.**—In an involuntary petition it is not necessary to negative all the circumstances which might excuse the non-payment. For a rule to show cause it is sufficient that a *prima facie* case be made. And where the petition alleged that the debtor had suspended payment on his commercial paper for more than fourteen days, and had not yet paid the same, that he was a merchant, and that the petitioners knew of no reason for the non-payment, except the neglect or inability of the debtor, *held*, it was *prima facie* an act of bankruptcy. *Id.*
 16. **PROCURING PARTNER TO LEAVE THE STATE.**—It is not an act of bankruptcy on the part of one partner to influence or procure the departure of another from the state. *In re Terry*, 110.
 17. **INFORMAL DISSOLUTION OF PARTNERSHIP.**—In Illinois, if the certificate of dissolution of a limited partnership does not fulfill the requirements of the statute, the partnership still continues, and such informal dissolution does not affect the rights of creditors. *Id.*
 18. **PETITION BY PART OF A FIRM.**—One or more partners may file their petition in bankruptcy without making the others parties, but notice of the pendency of the proceedings must be given to the other partners. *In re Moore*, 79.
 19. The petition must pray that the firm be declared bankrupt. *Id.*
 20. **PRACTICE ON REVIEW—NEWLY DISCOVERED EVIDENCE.**—The cir-

BANKRUPTCY—Continued.

- cuit court will not on petition for review hear additional testimony. Its power is simply revisory. *In re Great Western Telegraph Co.*, 358.
21. It will strike out from a petition for review all portions regarding newly discovered evidence. *Id.*
22. Where there is newly discovered evidence the district court may in a proper case open the decree and grant a rehearing, and *it seems* that the circuit court might peremptorily direct the district court so to do. *Id.*
23. Pending such application for re-hearing, the circuit court will suspend action on the petition for review, and afterwards review the new case as finally decided in the district court. *Id.*
24. **SETTLEMENT BY PROCEEDINGS.**—If the bankrupt can settle all but a few contested claims the court may, on consent of the creditors, dismiss the proceedings on security being given to the non-assenting creditors. *Id.*
25. **OPPOSITION TO DISCHARGE—ALLEGATIONS MUST BE SPECIAL.**—Allegations in opposition to a discharge are not sufficient when they simply follow the words of the statute. They must be as exact as the specifications in an indictment. *In re Butterfield*, 120.
26. No intendment will be made in favor of the pleader. The construction is more strict than in common-law proceedings. *Id.*
27. **DISCHARGE UNDER INSOLVENT LAW.**—A New York judgment creditor, who has re-sued his judgment in the State Court of Wisconsin, but also joined in insolvency proceedings in New York, cannot maintain a suit in the Federal Court on his Wisconsin judgment. *Brest vs. Smith*, 62.
28. The discharge bars the New York judgment, and the other is dependent upon it. *Id.*
29. **FIDUCIARY DEBT—COLLECTION BY AGENT.**—Money collected by an agent under an agreement to account and pay over the proceeds monthly to his principal, is not a debt created in a "fiduciary character" within the meaning of the bankrupt act. *Grover & Baker S. M. Co. vs. Clinton*, 324.
30. A bankrupt is not liable to arrest on such a debt, and it is discharged in bankruptcy. *Id.*
31. **ACT OF 1841.**—The words "fiduciary character," in the act of 1867, are essentially the same as "any other fiduciary character," in the act of 1841. *Id.*
32. Decisions under the bankrupt act of 1841, considered and approved. *In re Kimball*, disapproved. *Id.*
33. **MINGLING FUNDS—CONVERSION.**—*It seems*, that when an agent is to account monthly with his principal, a court might infer that the agent was allowed to mingle the money collected with his other funds, and to consider himself an absolute debtor for that amount, and if authority so to do may be implied from the course of dealing,

BANKRUPTCY—Continued.

- the agent would be exempted from special liability for a conversion of the money. *Id.*
84. **PREFERENCE—LIMITATION.** Where the obligor on a bond, in order to indemnify his sureties, obtains securities from one of his debtors and turns them over to his sureties, the transaction is a preference between the parties, under the first clause of the thirty-fifth section of the Bankrupt Act, and not a transfer under the second clause, and the four months' limitation applies. *Smith vs. Little*, 490.
85. The fact that the securities were made to run directly to the sureties does not change the character of the transaction when they were obtained at the instance of the obligor. A court of equity will look at the substance rather than the form of the transaction. *Id.*
86. **RETAINING JURISDICTION.**—Where a bill must be dismissed for want of equity, jurisdiction will not be retained to settle the priorities or equities between the defendants. *Id.*
87. **ASSIGNEE—DISCLOSURE TO CREDITORS.**—It is the duty of an assignee to disclose to the creditors, upon inquiry, and where it appears they are ignorant thereof, the main facts known to him relating to the condition and assets of the bankrupt estate. *Ex parte Perkins*, 254.
88. **DEBTORS PURCHASING CLAIMS TO SET-OFF.**—Where he knows there is a large sum of money on deposit in a bank, belonging to the estate, against which the bank claimed and were purchasing set-off, it is his imperative duty to state these facts to creditors inquiring concerning the value of their claims. *Id.*
89. **EXCUSES—WHAT INSUFFICIENT.**—It is not a sufficient excuse that he could not give definite estimates as to what the estate would pay, or that he says he did not intend to mislead any one. He is presumed to intend the necessary consequences of his own acts, and the concealment of the existence of this large deposit must mislead creditors and affect their action. Nor is it a sufficient answer or excuse that the books of the bankrupt could be examined by the creditors. *Id.*
40. **REPORTS.**—The assignee should also make, in season, the reports prescribed by the rules in bankruptcy. *Id.*
41. **REMOVAL—WHEN ORDERED.**—Where an assignee has failed in properly informing creditors in regard to their rights and the value of the assets, and the information has been suppressed in the interest of one class of creditors, it is the duty of the court to remove him. *Id.*
42. **PRACTICE.**—On a revisory petition to the circuit court, the proper practice is to direct the district court to remove the assignee and to appoint some other competent person in his place. *Id.*
43. **DISMISSAL OF PROCEEDINGS—WHERE MAJORITY OF CREDITORS RESIRE IT AND OFFER TO SECURE CLAIMS OF THOSE OBJECTING.**—Where the stockholders of a bankrupt railroad company purchase in good faith all the outstanding floating indebtedness of the company,

BANKRUPTCY—Continued.

- except a few minor claims, and all the creditors, except those representing these few claims, desire such a result, they should be allowed to have the bankruptcy proceedings dismissed, on giving proper security for the payment of the objecting creditors. *In re Indianapolis, Cincinnati & Lafayette R. R. Co.*, 287.
44. **WHEN FOR BEST INTEREST OF ALL PARTIES.**—It being evidently for the best interests of all parties, and the desire of a large majority, that the corporation be managed in the customary manner, the bankrupt court will not retain the custody and control of its property, to assist minor creditors in coercing their claims. *Id.*
45. **A BANKRUPT COURT HAS FULL EQUITABLE DISCRETION** and can allow a case to be withdrawn, provided it is done without prejudice to the interest of any party. *Id.*
46. **THE PROPER PRACTICE**—in such case is to require the deposit of adequate security for the payment of the claims of the non-assenting creditors, to remain until any contingency about them is ultimately settled by the highest court to which a case can be taken; the claims to be prosecuted with reasonable diligence. *Id.*
47. **SET-OFF.—LOSSES UNDER POLICIES NOT ALLOWABLE AGAINST SUBSCRIPTIONS TO STOCK.**—A claim against an insurance company for loss under its policies cannot be a set-off against an unpaid subscription to its capital stock. *Scammon vs. Kimball*, 431.
48. **UNPAID SUBSCRIPTION IS A TRUST FUND.**—Though the charter of the company only required the stockholder to pay in a part of his subscription, the balance was in the nature of a trust fund for the creditors of the company. *Id.*
49. **INSOLVENCY CHANGES THE RULE.**—Though in a solvent company the debts might be considered mutual and the set-off allowed, the fact of insolvency changes the rule. *Id.*
50. **STOCKHOLDER MUST PAY UP HIS STOCK.**—A stockholder coming into equity for relief should first do equity by making good his share of the capital stock. *Laurance vs. Nelson*, 21 N. Y., 158, approved. *Id.*
51. **FIDUCIARY DEBTOR.**—Though the Bankrupt Law recognizes rights of set-off, it was not intended to enable one occupying a fiduciary relation to take advantage of the bankruptcy of the company. *Id.*
52. **SET-OFF—WHEN ALLOWABLE.**—Set-off cannot be allowed except between parties sustaining the simple relation of debtor and creditor, and this principle excludes the case of the treasurer of an insurance company. *Id.*
53. **FRAUDULENT PURCHASE BY BANKRUPT—WHEN VENDOR MAY RECOVER GOODS FROM ASSIGNEE.**—A purchase of goods on credit by an insolvent man, with the intention of using their proceeds to pay other creditors, and never meaning or expecting to pay for them, is fraudulent, and the vendor has the right to recover them, even as against the assignee in bankruptcy, if he can identify the goods, and

BANKRUPTCY—Continued.

exercises his right of reclamation within a reasonable time. *Donaldson vs. Farewell*, 451.

54. **TITLE IS DEFEASIBLE.**—Such a sale does not pass to the purchaser an absolute title, but only one defeasible at the option of the vendor. *Id.*
55. Though the assignee holds the bankrupt's estate under a stronger right in many cases than the bankrupt himself could, he does not so hold it as to divest the right of reclaiming goods thus obtained by fraud. *Id.*
56. **PLEADING AND PRACTICE.**—The answer of the debtor to an involuntary petition must be in writing and verified. *In re Findlay*, 480.
57. The rules governing pleadings in common-law cases apply to the pleadings under the forty-first section of the Bankrupt Act, and the allegations of the debtor should be presented and embodied in substantially the same form as defenses in common-law cases. *Id.*
58. The court may in its discretion, issue a special venire and impanel a jury to try the issue at any time, without waiting for a regular term. *Id.*
59. **EXAMINATION OF DEBTOR BEFORE ADJUDICATION.**—The District Court may order the examination of the debtor against whom a petition in bankruptcy has been filed prior to the adjudication, even though he denies both the indebtedness and the act of bankruptcy. *In re Salkey*, 486.
60. **WHEN ALLOWED.**—Such an examination should not be allowed for the purpose of gratifying malice or curiosity, but simply in the furtherance of justice, and to protect the rights of the creditors. *Id.*
61. **MORTGAGEES CHARGEABLE WITH NOTICE OF DEBTOR'S CONDITION.**—To set aside a mortgage as a preference, void, under the bankrupt act, it is not necessary to find that the mortgagees knew the condition of the bankrupt and his intentions. It is sufficient if they had reasonable cause to believe him insolvent, and if they had notice of facts sufficient to put them on inquiry, they are chargeable with knowledge which an investigation of the bankrupt's condition would have developed. *Burpee vs. First National Bank of Janesville*, 405.
62. **JUDGMENT—CREDITOR'S RIGHTS RELATE BACK**—The fact that the petitioning creditor's claim existed at the time of giving the mortgage only as a liability and not as a debt, does not change the relation of the parties. The judgment being neither a payment nor satisfaction of the liability, the creditor's rights relate back to the time when the liability first became fixed. *Id.*
63. **CHATTEL MORTGAGE, WHEN VOID.**—A chattel mortgage authorizing the mortgagor to sell the property mortgaged, is void as against creditors, and delay on the part of the mortgagee in taking possession after maturity is fatal to his rights as against creditors or purchasers. The same rules apply as against the assignee in bankruptcy. *In re Forbes*, 510.

BANKRUPTCY—Continued.

64. **POSSESSION.**—When the mortgagee took possession some time after the maturity of his mortgage, and sold part of the goods mortgaged, he has no right to apply the proceeds on his indebtedness, but if he has not acted in bad faith, he may be allowed to retain sufficient to cover his actual expenses in making the sales. *Id.*
65. **A BILL OF SALE** made after possession so taken is a preference, and cannot be used to help out the defects in the mortgage. *Id.*
66. **PROOF OF DEBT.**—If, before the maturity of the mortgage, the mortgagor had taken in a partner, the mortgagee can only prove against the estate of the mortgagor—not against the partnership. *Id.*
67. **PRACTICE.**—On motion to expunge a proof of debt and claim to establish a set-off, personal judgment cannot be rendered against the creditor for money in his hands—that must be by suit against him. *Id.*
68. **PREFERENCE—CONVEYANCE TO WIFE.**—A conveyance by an insolvent debtor of his real estate to his wife without consideration, she giving a mortgage thereon to creditors who knew the debtor to be insolvent, is a preference under the Bankrupt Act, and void as against creditors. *Gibson vs. Dobie*, 198.
69. The mortgage of the wife is the same in legal effect as the mortgage of the husband. *Id.*
70. **PROOF OF DEBT—USURY.**—A creditor offering to prove a debt against a bankrupt estate, stands in the position of a plaintiff at law, and in Illinois if his debt is usurious, forfeits the whole interest. *In re Martin Prescott*, 523.
71. **ASSIGNEE** can take advantage of usury, and the defense is good so long as any part of the principal debt remains unpaid. *Id.*
72. **HOMESTEAD EXEMPTIONS.**—A bankrupt is entitled to a homestead exemption in property occupied by him as a homestead, even though he had previously waived his homestead rights in favor of a particular creditor. *In re Poleman*, 526.
73. **WAIVER.**—Such waiver only applies to persons claiming under the instrument in which the waiver was made, and does not inure to the benefit of the assignee or other creditors. *Id.*
74. **PRACTICE IN SETTING ASIDE HOMESTEAD.**—In Illinois, where the equity of redemption is less than one thousand dollars, the property should be set aside by the assignee as a homestead; where it exceeds that sum, the assignee should sell the property and pay the bankrupt one thousand dollars in cash from the proceeds, unless the property is susceptible of division so as to set apart the homestead. *Id.*
75. **GUARANTEE.**—Where partners, in compromise with their creditors, gave their note in settlement, guaranteed by the attorney, such guarantor cannot be made a party to bankruptcy proceedings against the partners, even though, after the settlement he became a partner. *In re Manning*, 497.
76. **TROVER.**—An action of trover will not lie by the assignee against judg-

BANKRUPTCY—Continued.

ment creditors to recover the value of the bankrupt's property, on execution sold prior to the commencement of the bankruptcy proceedings. *Gaytes vs. American*, 86.

BANKS AND BANKING—See BANKRUPTCY, 1-3.

1. **BANKER'S LIEN.**—A bank holding a customer's demand note has a lien upon the proceeds of drafts delivered to it for collection after the giving of the note, though collected after filing of petition in bankruptcy, and can apply such proceeds upon the note. *In re Farnsworth, Brown & Co.*, 223.
2. **RELATION OF BANK TO CUSTOMERS.**—The relation between a bank and its customers, is that of simple debtor and creditor—not principal and agent—and does not partake of a fiduciary character. *In re Bank of Madison*, 515.
3. **COLLECTIONS.**—A note deposited for collection, and passed to the credit of the depositor, becomes the property of the bank, and on the bankruptcy of the bank the proceeds go to the general creditors. The fact that the account was made good before the collection of the note does not make the bank a trustee as to the proceeds. *Id.*
4. **BURDEN OF PROOF.**—A customer of an insolvent bank must make out a very clear case before the court will allow payment of his claim in full. *Id.*

BILL OF LADING.

1. **RIGHTS OF HOLDER OF BILL OF LADING.**—The *bona fide* holder of a draft drawn against goods shipped, with bill of lading assigned, has a lien upon the goods in the hands of the consignee, and can recover from him the proceeds of their sale, even though the consignor be indebted to the consignee on general account. *Lee vs. Bowen*, 154.

BILL OF REVIEW—See PRACTICE, 24.**BILLS, NOTES AND CHECKS—See BANKS AND BANKING.**

1. **NOTE FALLING DUE ON SUNDAY.**—Where a note, drawn without grace, falls due on Sunday, demand and protest on Saturday is good to hold the indorsers. *Doremus vs. Burton*, 57.
2. **CERTAINTY OF TIME OF PAYMENT.**—A premium note to a mutual insurance company, payable "at such times as the directors of said company may, agreeably to their act of incorporation, require," is rendered due and payable when the directors have properly required the money to be paid. *Gaytes vs. Hibbard*, 99.
3. **CERTAINTY OF PAYEE.**—If made payable to the company, "or the treasurer for the time being," these latter words are simply indicative of the officer through whom the payment might be made. *Id.*
4. **LIABILITY OF INDORSER.**—In Illinois, the indorsee of a promissory note, the maker of which has been adjudicated bankrupt, may proceed at once against the indorser. *National Bank of Commerce vs. Booth*, 129.
5. The case is not similar to that of a deceased maker of a note, where

BILLS, NOTES AND CHECKS—Continued.

- the holder must pursue the estate of the maker in the probate court.
Id.
6. **POSSESSION OF TIME DRAFT—PRESUMPTION.**—The possession by the payee of a time draft unaccepted and uncanceled, is not evidence, *prima facie*, that he had paid it. There not being, until acceptance, any obligation on the part of the drawee, the rule applicable to promissory notes does not apply. *Hankin vs. Squires*, 186.
 7. **BURDEN OF PROOF.**—When payment is alleged, is on the defendant. *Id.*
 8. **CIRCUMSTANCES—PRESUMPTIONS.**—Where it is the custom of a bank to stamp all drafts paid at its counter, the jury may consider the absence of such stamp on a draft claimed to have been paid to the teller, as a suspicious circumstance; also, the fact that by the books of the bank the draft did not appear to have been paid; also, the fact that the payment on presentation of a time draft would be a circumstance which the officer of the bank would be likely to recollect.
Id.
 9. **BONA FIDE HOLDER.**—A *bona fide* transfer of an interest in a partnership may be made without writings or vouchers. *In re Great Western Telegraph Co.*, 363.
 10. A person may be a *bona fide* holder of a promissory note without having paid for it in cash, if it is a genuine business transaction in which he believed that he was paying with a valid and valuable asset. *Id.*
 11. The fact that he considers the maker of a note "slow," does not show that he is not a *bona fide* holder, especially where it appears that he paid for the note in other securities equally "slow." *Id.*
 12. **LIS PENDENS.**—A note in the hands of a *bona fide* holder is not avoided by the fact that the contract in part payment of which it was issued was fraudulent, and proceedings to annul the contract were pending at the time the note was issued. *Id.*
 13. Though the rule of *lis pendens* would apply to a contract assigned during the pendency of litigation over it, the doctrine cannot be carried so far as to affect commercial paper given by the litigating parties.
Id.
 14. Where a promissory note is fair upon its face, an indorsee is not bound to inquire into the consideration or circumstances under which it was given. *Id.*
 15. **NOTES OF CORPORATION—USAGE.**—A corporation may be bound by promissory notes issued by its treasurer in accordance with the usage, as well as by express authority. *Id.*
 16. **INCIDENT TO BUSINESS—AUTHORITY OF OFFICERS PRESUMED.**—The power to make commercial paper is incident to a business corporation, and the usual executive officers are presumed to act within the scope of their authority, and every intendment will be made to support the paper given, especially when signed by the financial officer of the company. *Id.*

BONA FIDE PURCHASER.—*See* MUNICIPAL BONDS, 2, 3.

BONDS.—*See* MUNICIPAL BONDS.

BURDEN OF PROOF.—*See* EVIDENCE, 1, 3.

CAPTAIN.—*See* ADMIRALTY, 21-23, 30.

CARRIER.—*See* POSTAL LAWS.

CHANCERY.—*See* JURISDICTION, 3.—PRACTICE, 12, 24, 27, 35, 37.

1. **CREDITOR'S BILL—CONFLICTING CLAIMS.**—After the appointment of a receiver under a creditor's bill another creditor can acquire no rights by levying an attachment upon property of the judgment debtor. Where the court has obtained jurisdiction under a creditor's bill it will protect the creditor in following up his rights. *Perego vs. Bonesteel*, 66.

CHATTEL MORTGAGE.

1. **WHEN VOID.**—A chattel mortgage authorizing the mortgagor to sell the property mortgaged is void as against creditors, and delay on the part of the mortgagee in taking possession after maturity is fatal to his rights as against creditors or purchasers. The same rules apply as against the assignee in bankruptcy. *In re Forbes*, 510.
2. **POSSESSION.**—When the mortgagee took possession some time after the maturity of his mortgage, and sold part of the goods mortgaged, he has no right to apply the proceeds on his indebtedness, but if he has not acted in bad faith he may be allowed to retain sufficient to cover his actual expenses in making the sales. *Id.*
3. **A BILL OF SALE**—made after possession so taken is a preference, and cannot be used to help out the defects in the mortgage. *Id.*

COLLISION.—*See* ADMIRALTY, 1-5, 11, 15-17.

COMMON CARRIERS.—*See* POSTAL LAWS.

CONSIGNOR AND CONSIGNEE.—*See* ADMIRALTY, 40-43.—BILL OF LADING.

CONSTRUCTION.

CONSTRUCTION OF STATUTES.—In the construction of statutes courts should give to words their ordinary meaning. *United States vs. Milwaukee & St. Paul R. R. Co.*, 420.

CORPORATION.—*See* BANKRUPTCY, 47-50.—BILLS, NOTES AND CHECKS, 15, 16.—MUNICIPAL BONDS.

1. **TRANSFER—WHAT CONSTITUTES.**—When stock is by its terms, transferable only on the books of the company, its delivery to an officer of the company with a request that he transfer it, is not sufficient to pass the legal title. Until it is actually transferred, the assignee has no legal right of action in his own name. *Brown vs. Adams*, 181.
2. **DISTRIBUTIVE SHARE.**—It is not the right of a court of law to inquire into the rights of a stockholder to a distributive share in the assets remaining after an adjustment of the affairs of a corporation. *Id.*
3. **CASHIER—AGENCY.**—A cashier who has made sale of corporate property, and holds a balance in his hands, must be deemed the agent of the board of directors, and not of the respective stockholders, and

CORPORATION—Continued.

cannot be charged by an individual stockholder as holding such balance for his benefit. *Id.*

COUNTERFEITING.—See CRIMINAL LAW, 1.

CREDITOR'S BILL.—See CHANCERY—PRACTICE, 11.

CRIMINAL LAW.—See PLEADING, 9-12.

1. **COUNTERFEIT UNITED STATES NOTES.**—On an indictment for having in his possession, with intent to utter, United States treasury notes, the accused may show that he received them accidentally or in ordinary course of business. *U. S. vs. Kennolly*, 122.
2. **GOOD CHARACTER** may be shown as evidence of his intention; and absence of such evidence is strong circumstance to show that he has no such evidence to produce. *Id.*
3. **WITNESSES SUMMONED BY UNITED STATES FOR ACCUSED—PROCESS.**—It is the duty of the court, on application of the prisoner, showing that he is unable to send for his witnesses, to summon them at the expense of the Government. *Id.*
4. **BAD CHARACTER.**—The prosecution cannot give evidence as to the character of the accused, unless he opens the door by introducing evidence of character himself. *Id.*
5. The fact that the accused, when arrested, made no explanation of the manner in which he got the counterfeit money, nor any assertion of innocence, is a circumstance which may be considered by the jury against him. *Id.*

CUSTOM.—See ADMIRALTY, 39.

DAMAGES.—See ADMIRALTY, 8-14.—PATENTS, 6-9, 14-17.

1. **BREACH OF GUARANTY—MEASURE OF DAMAGES.**—The measure of damages for breach of guaranty of the amount due on a note, there being no guaranty of payment or collectability, is what the plaintiff has lost by that breach, which is the value of a judgment if one had been obtained against the makers. *Head vs. Green*, 311.
2. Where the makers were solvent, but proved payment, the measure is the full amount due on the note at the time of bringing suit, as stated in the guaranty. *Id.*

DEDICATION.—See REAL ESTATE, 10-12.

DEMURRAGE.—See ADMIRALTY, 38-43.

DEMURRER.—See PLEADING, 6-8.

DEPOSITION.—See PRACTICE, 14-18.

DESCENT.—See REAL ESTATE, 15-17.

DISCHARGE.—See BANKRUPTCY, 25, 27, 28, 30.

DISSOLUTION OF PARTNERSHIP.—See PARTNERSHIP.

DISTILLERS.—See INTERNAL REVENUE.

DIVORCE.—See HOMESTEAD, 4, 5.

DRAFT.—See BILLS, NOTES AND CHECKS.

EJECTMENT.—See REAL ESTATE, 7-8.

ESTOPPEL.—See BANKRUPTCY, 9—REAL ESTATE, 12.

ESTOPPEL—Continued.

A stockholder who retains his stock, and continues to participate in the profits of the corporation, without denial of his membership, cannot successfully repudiate his contract, holding that he is not obliged to pay an assessment upon the ground of certain irregularities in the increase of the capital stock of the corporation. *Payson vs. Withers*, 269.

EVIDENCE—See BANKRUPTCY, 20-22—See PRINCIPAL AGENT, 11, 13.

1. **BURDEN OF PROOF**, in establishing the defense of fraud by the insurer is on the defendant, and the evidence must be either direct and positive, or the circumstances must be convincing, and admitting no other natural conclusion. *Huchberger vs. Home Ins. Co.*, 105.
2. **POSSESSION OF TIME DRAFT—PRESUMPTION.**—The possession by the payee of a time draft unaccepted and uncanceled is not evidence *prima facie* that he had paid it. There not being until acceptance, any obligation on the part of the drawee the rule applicable to promissory notes does not apply. *Harkin vs. Squires*, 186.
3. **BURDEN OF PROOF.**—When payment is alleged it is on the defendant. *Id.*
4. **CIRCUMSTANCES—PRESUMPTIONS.**—Where it is the custom of a bank to stamp all drafts paid at its counter, the jury may consider the absence of such stamp on a draft claimed to have been paid to the teller, as a suspicious circumstance; also, the fact that by the books of the bank the draft did not appear to have been paid; also the fact that the payment or presentation of a time draft would be a circumstance which the officers of the bank would be likely to recollect. *Id.*
5. **CHARGING JURY—STATE LAW AND PRACTICE**—are not binding on the federal courts. *Id.*
6. **WHERE HIGHEST ESTIMATE ADOPTED—BURDEN ON OBJECTOR.**—Where under conflicting evidence the master had placed the highest estimated value upon property, the court will not set aside the master's report in this respect, unless there are circumstances in the case which show that the evidence fixing the lower value was more entitled to credit, and it is the duty of the party making the exception to satisfy the court that the report is wrong in this respect. *Pullan vs. C. & C. Air-Line R. R. Co.*, 237.
7. **PLAINTIFF'S BAD CHARACTER.**—Defendant may show that plaintiff's reputation sustained no injury, because he had none to lose. *Whitney vs. Janesville Gazette*, 330.
8. **PRESUMPTION.**—He is presumed to be of good character until the contrary is shown, and the burden of proof is on the defendant. It is his general reputation, and not his reputation as to any particular transaction, which is in issue. *Id.*
9. **SQUATTERS—EJECTMENT.**—The owner of the fee can maintain ejectment against a squatter who has neither claim nor color of title. *Sykes vs. Hayes*, 529.

EVIDENCE—Continued.

10. Where the squatter had admitted title in the plaintiff's grantor, it is not necessary that the plaintiff produce other evidence of title than the conveyance from his grantor. *Id.*

EXEMPTION—See HOMESTEAD, 6.

EXPRESS COMPANIES—See POSTAL LAWS.

FAILURE OF CONSIDERATION—See PLEADING, 2-3.

FERRY-BOAT—See ADMIRALTY, 25, 27.

FIDUCIARY DEBT—See BANKRUPTCY, 29-33, 47-52.

FORECLOSURE—See REAL ESTATE, 1-6.

FORFEITURE—See INSURANCE, 24.

FORGED DEED—See REAL ESTATE, 18.

FRAUD—See VENDOR AND VENDEE.

GARNISHMENT—See PRACTICE, 10, 11.

GUARANTY—See DAMAGES.

HOMESTEAD—See BANKRUPTCY, 72-74.

1. HOMESTEAD EXEMPTION does not protect a defendant in property taken in exchange for goods transferred in fraud of his creditors. *Pratt vs. Burr*, 36.
2. The privileges of a Homestead Act may be forfeited by fraud. *Id.*
8. WRIT OF ASSISTANCE will be granted when the defendants refuse to surrender under the decree. *Id.*
4. HOMESTEAD—DIVORCE.—The Homestead Act should be liberally construed, and where a decree of divorce gave the custody of the child to the mother, and she was then in possession of the homestead, ejectment will not lie by the husband to recover it. *Sellon vs. Reed*, 125.
5. During the pendency of a bill for divorce, the husband and wife have no power to make an arrangement about the property which shall be binding, unless embodied in the decree. *Id.*
6. HOMESTEAD EXEMPTION must exist and be claimed at the time the writ comes to the officers hands. A defendant, moving onto property thereafter cannot hold it exempt as a homestead. *Freeman vs. Stewart*, 19.
7. PRACTICE—A creditor's bill having been filed, and a receiver appointed the court will direct the assignment of such property to the receiver. *Id.*

HOTEL-KEEPER—See INN-KEEPER

HUSBAND AND WIFE—See MARRIED WOMAN—See REAL ESTATE, 19-22.

1. WIFE'S PROPERTY—WHEN HUSBAND MAY RECOVER FOR.—Property belonging to the wife may be recovered, in an action brought by the husband, provided it was given to the wife by the husband. *Myers vs. Cottrill*, 465.
2. The fact that the property of the wife was in the same room with a merchandise owned by the husband does not alone prevent him from recovering, *Id.*

INADEQUACY OF CONSIDERATION—*See* **PRINCIPAL AND AGENT**, 6-8, 13.

INFRINGEMENT—*See* **PATENTS**, 4-5.

INJUNCTION—*See* **PATENTS**, 2-5.—**PRACTICE**, 19.—**WASTE**.

INN-KEEPER.

1. **LIABILITY OF HOTEL-KEEPERS.—GOODS OF COMMERCIAL TRAVELER.**
—Where a guest at a hotel takes to his room valuable articles of merchandise and keeps them there for show and for sale, inviting purchasers to examine them, the hotel-keeper is relieved as to such merchandise from the special liability of the common-law. *Myers vs. Cottrill*, 465.
2. The fact that such guest sleeps in the room does not alter this rule. *Id.*
3. **EFFECT OF WISCONSIN STATUTE.—HOTEL-KEEPER NOT BOUND TO PROVIDE SAFE FOR MERCHANDISE.**—The statute of Wisconsin does not alter this rule, for that did not contemplate the case of guests bringing quantities of merchandise to be placed in the safe, nor did it intend to compel an inn-keeper to receive whatever merchandise his guests might choose to bring, nor to provide a safe to contain it. *Id.*
4. **LIABLE FOR NEGLIGENCE.**—These rules will not, however, under either the common law or the statute, excuse the inn-keeper for the negligence of either himself or his servants. *Id.*
5. The inn-keeper, knowing that such goods were in the room, should use reasonable diligence with reference to the condition and value of the property. *Id.*
6. **NEGLECT IS A RELATIVE TERM**—depending very much upon the circumstances of each case, and is frequently a mixed question of law and of fact. *Id.*
7. **WIFE'S PROPERTY.—WHEN HUSBAND MAY RECOVER FOR.**—Property belonging to the wife may be recovered for in an action brought by the husband, provided it was given to the wife by the husband. *Id.*
8. The fact that the property of the wife was in the same room with the merchandise does not alone prevent him from recovering. *Id.*
9. **HOTEL-KEEPER MUST BRING HIMSELF STRICTLY WITHIN THE STATUTE.**—The inn-keeper, in order to avail himself of the state statute as a defense, must show that he has literally complied with it. *Id.*

INSOLVENT LAW—*See* **BANKRUPTCY**, 27, 28.

1. **SERVING PARTY TO SUIT.**—A non-resident defendant, coming within a state for the purpose of defending his suit, cannot be legally served with process in another suit, even though the prior suit be first discontinued. *Juneau Bank vs. McSpedan*, 64.
2. **STRIKING OUT SERVICE.**—The court will order the service so made to be stricken out. *Id.*

INSURANCE—*See* **BANKRUPTCY**, 47.

1. **LIABILITY OF STOCKHOLDERS.**—In an action against a stockholder, brought by the assignee of a bankrupt insurance company, to recover an assessment on stock, it is not a sufficient defense to show ignor-

INSURANCE—Continued.

- ance on the part of the defendant as to the condition and circumstances of the company when his subscription was taken. *Payson vs. Withers*, 269.
2. **STATEMENTS MADE BY AGENTS** of the company do not affect the liability of the defendant, as loose declarations made at the time cannot change a written contract. *Id.*
3. **SOLICITING SUBSCRIPTIONS NOT ILLEGAL.**—The soliciting of subscriptions to the capital stock of a foreign corporation is not an act or agreement intended to be rendered inoperative by the act of June 17, 1852, of the state of Indiana. *Id.*
4. **INCREASE OF STOCK—EFFECT ON SUBSCRIPTION.**—Where it is provided in the charter of a corporation that "the capital stock shall be \$1,000,000, and may be increased to not exceeding \$5,000,000, at the discretion of the stockholders," and where an amendment is made which declares "that the board of directors shall have power to increase the capital stock of said company from time to time in their discretion," a subsequent increase of the capital stock will not invalidate a subscription to the capital stock made previous to the passage of the amendment, and it makes no difference that the increase was made by the board of directors instead of the stockholders. *Id.*
5. **EVERY STOCKHOLDER** takes his shares subject to the lawful control of the legislature and of the board of directors. *Id.*
6. **LEX LOCI.**—Where a citizen of one state makes a contract to be executed in another, he is bound by the law of the state where the contract is to be performed. *Id.*
7. **ESTOPPEL.**—A stockholder who retains his stock, and continues to participate in the profits of the corporation without denial of his membership, cannot successfully repudiate his contract, holding that he is not obliged to pay an assessment upon the ground of certain irregularities in the increase of the capital stock of the corporation. *Id.*
8. **INSURANCE STOCK NOTES.**—An insurance company has no right to divide its risks and capital into classes, and restrict the liability upon stock notes to the class in which they are placed. The insured has the right to call upon the whole capital of the company and require an assessment upon all the stock notes. *Fitzpatrick vs. Troy Ins. Co.*, 48.
9. **NOTICE AND PROOFS OF LOSS.**—The condition of a policy of re-insurance, that all persons having a claim in case of loss shall proceed at once to give immediate notice and render a particular account of the loss, etc., means that the notice and schedule must be served in a reasonable time under the circumstances. *Cashan vs. Northwestern National Ins. Co.*, 476.
10. **SERVICE OF COPY PROOF OF LOSS.**—The service of copies of proofs of loss and of notice, etc., upon the re-insurer, is sufficient if not objected to at the time. *Id.*

INSURANCE—Continued.

11. **LIABILITY OF RE-INSURER.**—The condition in a policy of re-insurance, that in case of loss the re-insurer shall pay *pro rata* at and in the time and manner as the re-insured, means that the re-insurer shall have all the advantages of the time and manner of payment specified in the policy of the re-insured. It has no reference to the insolvency of the re-insured. *Id.*
12. **RE-INSURERS**, having paid to the insurer their proportions of a loss insured against, may maintain a libel *in rem* in their own names to recover of the carrier the amounts so paid with interest, where the owner had been fully satisfied for the loss by the original insurer. *The Ocean Wave*, 378.
13. **LIBEL BY INSURER.**—In case of a total loss of a cargo by collision, a libel may be brought by the insurer against the colliding vessel after notice and proof of the loss and demand of payment, though without actual payment. *The Manistee*, 381.
14. **WHEN WILL LIE, THOUGH LOSS NOT ACTUALLY PAID.**—The insured, having been fully satisfied for the loss, and not intervening or opposing the prosecution of the libel of the insurer, the carrier cannot be permitted to raise the objection of non-payment of the loss before libel brought. *Id.*
15. **POLICY ISSUED IN DISREGARD OF STATUTORY REQUIREMENTS.**—Where the statutes of a state require foreign insurance companies to comply with certain requirements, and declare penalties for doing business in disregard of these requirements, in case of a loss on a policy issued in disregard of such requirements, a carrier cannot be permitted to make this a defense to a libel, the loss having been paid by the company. *Id.*
16. **CERTAINTY OF TIME OF PAYMENT.**—A premium note to a mutual insurance company, payable "at such time as the directors of said company may, agreeably to their act of incorporation, require," is rendered due and payable when the directors have properly required the money to be paid. *Gaytes vs. Hibbard*, 99.
17. **CERTAINTY OF PAYEE.**—If made payable to the company, "or the treasurer for the time being," these latter words are simply indicative of the officer through whom the payment might be made. *Id.*
18. **THE SIXTY DAYS** for an insurance policy before right of action accrues, begin to run from the time of furnishing the proof, not from the time of furnishing additional proof required by the company. *Huchberger vs. Home Ins. Co.*, 106.
19. **FRAUD OF INSURED.**—If the insured, with intent to defraud, makes claim for a larger loss than he actually sustained, he forfeits his rights. *Id.*
20. **BURDEN OF PROOF** in establishing this defense is on the defendant, and the evidence must be either direct and positive, or the circumstances must be convincing and admitting no other natural conclusion. *Id.*

INSURANCE—Continued.

21. **INTEREST ON POLICY.**—On verdict for insured, the jury should allow interest from the commencement of the action. *Id.*
22. **LOCALITY OF PROPERTY INSURED.**—Locality is an important element in an insurance policy; and when the location of the property is specified, the risk cannot be extended so as to cover it, if, in fact, it is situated in an adjoining building. This is true, though the insurer supposed that the property was in the building described: and the policy cannot be re-formed on the ground of mistake. *Severance vs. Continental Ins. Co.*, 156.
23. Though it appear that the same agents would have taken the risk with equal readiness in either building, though perhaps in a different company, this fact cannot change the contract actually entered into. *Id.*
24. **FORFEITURE OF POLICY—COMPANY CONFINED TO REASON ALLEGED.**—Where forfeiture of an insurance policy is claimed for non-compliance with its conditions, the company is bound by the reason which they assign at the time;—they cannot declare a forfeiture on one ground and then claim the advantage of additional grounds, and it seems they cannot claim a cancellation broadly, and give any reason they may see fit afterwards. *Cahill vs. Andes Ins. Co.*, 211.
25. **SOLICITOR—AGENCY—PAYMENT OF PREMIUM.**—Where the insurance solicitor, who is not the agent of any company, but procures the "placing" of insurance, has placed a risk, and the company delivers him the policy for delivery to the assured, he becomes for that risk the agent of the company, and payment of the premium to him binds the company; and though he never pays the money to the company, the policy remains binding, and cannot be forfeited for non-payment of premium. *Id.*
26. **CLAUSE AS TO PAYMENT OF PREMIUM.**—This is true though a clause in the policy provides that the policy shall not take effect until the premium is actually paid, for the presumption is that the solicitor was authorized to receive the premium, and when the company has given him the credit and the assured is thus misled, the company cannot take advantage of this clause. *Id.*

INTEREST.—See USURY.

INTEREST ON POLICY.—On verdict for insured, the jury should allow interest from the commencement of the action. *Huchberger vs. Home Ins. Co.*, 106.

INTERNAL REVENUE.

1. **DISABLED DISTILLERY.**—In an action on a distiller's bond, under the Act of Congress of July 20, 1868, a plea that the still blew up, of which the assessor was duly notified, whereupon he locked up and took control of the property, is a good plea as to the time the still was disabled. *United States vs. Miller*, 128.
2. If the partially manufactured material is duly turned over to the prop-

INTERNAL REVENUE—Continued.

per officers, the distiller should not be charged for spirits, which he could not distil. *Id.*

JUDGMENT—See PRACTICE, 20.**JURISDICTION—See CHANCERY—PRACTICE, 28-31.**

1. **COLORABLE CONVEYANCE TO CONFER JURISDICTION—PRACTICE—**The defendant, after judgment in ejectment and new trial allowed, cannot maintain a bill for discovery whether the conveyance to plaintiff was not merely colorable, and made in order to give this court jurisdiction. *Richardson vs. Muttison*, 31.
2. **SERVICE UPON DEFENDANT OUT OF HIS DISTRICT.**—The acts of Congress confer no jurisdiction over a defendant who is served with process while temporarily in a district in which he does not reside. The defendant has the privilege of litigating in the federal court in the state of his residence. *Smith vs. Tuttle*, 159.
3. **DECREE—PRESUMPTION.**—If a decree of foreclosure shows that the court was apprised of the existence of infant heirs-at-law, and took measures to preserve their rights, the legal presumptions in favor of the validity of the decree are not limited by the production of the bill in which the names of such heirs are not given, but process is prayed against them generally. *Kibbe vs. Dunn*, 233.
4. **INTENDMENT—JURISDICTION.**—The rule of intendment in favor of titles derived under judicial proceedings is, that the court will presume every act or thing to have been done, necessary to confer jurisdiction, which the record does not show was not done—particularly when the record produced shows that the whole record and proceedings have not been preserved. This rule should be enforced in all its liberality where parties have slept upon their rights. *Id.*
5. **PREVENTION OF BRIDGES.**—The United States has the right to prevent the construction of bridges otherwise than as prescribed by Congress, and the federal courts have jurisdiction for that purpose. *United States vs. Milwaukee & St. Paul R. R. Co.*, 410, 420.

LETTERS—See POSTAL LAWS.**LEX LOCI.**

LEX LOCI.—Where a citizen of one state makes a contract to be executed in another he is bound by the laws of the state where the contract is to be performed. *Payson & Withers*, 269.

LIBEL.

1. **PRINTED SLANDER** is a higher offense than merely speaking the defamatory words. *Winney vs. Jonesville Gazette*, 380.
2. **LIBEL DEFINED.**—A publication without justification or lawful excuse, and calculated to injure the reputation of another, and expose him to hatred or contempt, is a libel. *Id.*
3. The words are to be taken in their ordinary sense, and if directly calculated to degrade a man in the estimation of his acquaintances, and to injure his business character, they are actionable *per se* without proof of malice or special damages. *Id.*

LIBEL—Continued.

3. An account of an assault and battery, if correctly given as an item of local news, cannot be complained of. But though the plaintiff may have been the aggressor, and have violated the law, this did not authorize the writer to go outside of the transaction, and reflect upon the plaintiff's personal and business character, unless the strictures were true. *Id.*
5. **MALICE.**—If the charge is false, malice need not be proved, it will be implied. Good motives will be implied from the truth of the charge. *Id.*
6. **JUSTIFICATION.**—The truth of the publication is the only perfect answer and bar, and the justification, to be complete, must be co-extensive with the libel. *Id.*
7. **MITIGATING CIRCUMSTANCES.**—If offered in evidence, to repel the presumption of malice, it must be shown that the defendant knew of them at the time of making the charge. *Id.*
8. **PLAINTIFF'S BAD CHARACTER.**—Defendant may show that plaintiff's reputation sustained no injury, because he had none to lose. *Id.*
9. He is presumed to be of good character, until the contrary is shown, and the burden of proof is on the defendant. It is his general reputation, and not his reputation as to any particular transaction, which is in issue. *Id.*

LIMITATION—See REAL ESTATE, 18.

LAPSE OF TIME—does not raise the presumption of payment if proceedings have been taken to foreclose a mortgage, or if the mortgagor and his heirs have never resided within the state. *Kibbe vs. Thompson*, 226.

LIS PENDENS.

1. **LIS PENDENS.**—A note in the hands of a *bona fide* holder is not avoided by the fact that the contract in part payment of which it was issued was fraudulent, and proceedings to annul the contract were pending at the time the note was issued. *In re Great Western Telegraph Co.*, 863.
2. Though the rule of *lis pendens* would apply to a contract assigned during the pendency of litigation over it, the doctrine cannot be carried so far as to affect commercial paper given by the litigating parties. *Id.*

MARITIME LIENS—See ADMIRALTY.

MARRIED WOMEN—See REAL ESTATE, 19-23.

1. **BANKRUPTCY.**—In Indiana a petition in bankruptcy will not lie against a married woman where it is not shown that she has a separate estate. *In re Rachel Goodman*, 401.
2. The statute not having removed her common-law disabilities, she is still incompetent to contract. *Id.*
3. The district court will consider the state statutes and decisions, in applying the bankrupt law to married women. *Id.*

MARSHALL—*See* PRACTICE, 32.

MASTER AND SERVANT.

1. **PLEADING NEGLIGENCE.**—In an action by an employe against a corporation for injuries received in falling through a hatchway, it is not a sufficient allegation that the master and mates were negligent in leaving the hatchway open and not placing proper lights or guards around it. *Malone vs. Western Transportation Co.*, 315.
2. **As a corporation can only act through agents, the only proper charge of negligence in such case is that the boat was improperly constructed and that the accident happened by reason of such defective construction while the plaintiff was exercising due care.** *Id.*
3. **DUTY OF SERVANT.**—A person employed on a boat to assist in unloading must be presumed to possess the usual knowledge in regard to the construction of the vessel, and unless the hatch was located in an unusual place he is bound to know its location, and it is as much his duty to see that the hatch is closed or properly protected as it is the duty of the captain or mates. *Id.*
4. **DUTY OF SHIP OWNER.**—A ship owner who provides a sea-worthy vessel, properly equipped, and commanded by competent officers, has discharged his duty towards the subordinates, and cannot be held liable for mere neglect of the officers. *Id.*
5. **FELLOW SERVANTS.**—Subordinates must be deemed to have entered upon the service with the understanding that they took their chances of negligence or carelessness on the part of others engaged in common employment. *Id.*

MATE—*See* ADMIRALTY, 29-30.

MEASURE OF DAMAGES—*See* DAMAGES—PATENTS, 6-17.

MORTGAGE—*See* CHATTEL MORTGAGE. **REAL ESTATE, 3-6.**

1. The grantee of the mortgage in possession must prevail in an action of ejectment brought by the mortgagor after condition broken. *Kibbe vs. Dunn*, 233.
2. **MORTGAGE MAY COVER FUTURE EARNINGS—EQUITABLE LIEN.**—Notwithstanding the general rule that the mortgagor, until some action by the mortgagee, is entitled to the earnings and profits of the mortgaged property, it is competent for the parties to agree in the mortgage that such future earnings and profits shall be held in equity by the mortgagee, and under such a contract, such income, whenever received, is operated upon by the mortgage, and the party receiving it holds it in trust for whoever is in equity entitled to it. *Pullan vs. O. & C. Air-Line R. R. Co.*, 237.
3. **WHEN MORTGAGOR CHARGEABLE AFTER ORDER TO SURRENDER.**—Such a mortgagor remains chargeable with the income, even after he has offered in open court to surrender the property to the mortgagee. The mortgage only took effect upon the income when earned, and as long as the mortgagor operated the road and earned income, he could not avoid his responsibility for it. The only valid answer

MORTGAGE—Continued.

would be either that he did not operate the road or that there was no income earned. *Id.*

MUNICIPAL BONDS.

1. Where subscriptions of private citizens to the capital stock of a railroad corporation are taken up, and a subscription of the city substituted by consent, such an arrangement does not invalidate the city bonds unless the citizens had been deceived, or had voted or petitioned for the subscription under a misconception of the facts. *Davis vs. City of Kendallville*, 280.
2. **RECITALS IN BONDS.**—Where bonds bear upon their face the statement that they have been issued in pursuance of law, and under the contingencies required by law, a *bona fide* holder is not bound to go back and examine all the intermediate steps taken prior to their issue. *Id.*
3. **BONA FIDE HOLDER.**—He is not presumed to have notice of everything which takes place before the issuing of the bonds; and an averment that the proceedings of the city council were spread upon the records of the city is not sufficient to charge him with notice. *Id.*
4. **SUBSCRIPTION BY CITY—HOW PROVED.**—A resolution of a common council declaring the subscription and approved by the Mayor, is sufficient to show a subscription by the city. *Id.*

NATIONAL BANKS—See BANKRUPTCY, 1-4.**NAVIGATION—See ADMIRALTY, 15-20.**

1. **GOVERNMENT AUTHORITY OVER NAVIGABLE WATERS.**—Congress has authority to regulate or prohibit the construction of bridges across the Mississippi river. *United States vs. Milwaukee & St. Paul R. R. Co.*, 410.
2. **DELEGATED AUTHORITY.**—It can also delegate that authority to one of the chiefs of a department. *Id.*
3. **PREVENTION OF BRIDGES—JURISDICTION.**—The United States has the right to prevent their construction otherwise than as prescribed by Congress, and the federal courts have jurisdiction for that purpose. *Id.*
4. The acts of Congress of April 1st and June 4th, 1872, construed. *Id.*
5. **AUTHORITY OF SECRETARY OF WAR.**—Under these acts the Secretary of War had the right to determine whether the construction of a bridge at a given point would seriously affect the navigation of the river and to declare that a bridge should not be there built. *Id.*
6. **JUDICIARY WILL NOT INTERFERE WITH LEGISLATIVE POWER.**—This being a legislative power, the judicial department of the Government will not interfere with it. *Id.*
7. **TECHNICAL INFORMALITY.**—Though the disapproval of a particular location by the Secretary of War may not be in technical form, it will not therefore be ignored by the court. *Id.*

NAVIGATION—*Continued.*

8. The federal courts will not review a decision of the head of the department on a matter referred to him by Congress for determination. *United States vs. Milwaukee & St. Paul R. R. Co.*, 420.
9. SECRETARY OF WAR—HIS POWER.—In the act of June 4th, 1872, Congress designed that the Secretary of War should locate the bridge across the Mississippi river, to accommodate all the interests involved. *Id.*
10. By the fourth section of the act of April 1st, 1872, the Secretary of War had authority to pass upon the location of the bridge, and this court will not review his decision, but will insist on enforcing it. *Id.*
11. The Secretary having disapproved a location selected by the company, it has no right to construct a bridge at that point. *Id.*
12. A disapproval by the Secretary is binding, though not expressed in the manner and form required by the act. *Id.*
13. RAILROAD COMPANY MUST FOLLOW CONDITIONS PRESCRIBED.—Where Congress has prescribed the limitations and conditions upon which a bridge may be constructed, a company has no right to build a bridge otherwise. *Id.*
14. JURISDICTION.—The federal courts have jurisdiction of a suit by the United States to restrain the placing of obstructions in its navigable waters. *Id.*
15. THE OCONTO RIVER is, in contemplation of law, a navigable stream. *Leigh vs. Holt*, 338.
16. RIGHT TO CONSTRUCT PIERS OR BOOMS.—Individual property owners upon its banks have, strictly speaking, no right to construct booms or piers in it without authority from the legislature. *Id.*
17. The status of the owner of such boom or pier is not changed by the fact that they were purchased and not constructed by him. *Id.*
18. ACQUIESCENCE.—Where the construction of such piers and booms had been acquiesced in by the public, their owners must be considered to have acquiesced in their construction and maintenance by one another. One boom owner cannot bring a suit against another simply for the construction and maintenance of a boom. *Id.*
19. DUTY OF A BOOM-OWNER.—Nevertheless, it is the duty of the boom-owner not to interfere with the rights of other persons or their property on the river, and he must use unusual diligence in keeping a passage-way clear. *Id.*
20. *It seems*, that as to any person not connected with any such obstruction, the construction and maintenance of piers and booms would be illegal, and the owner would be accountable for any damage so sustained. *Id.*
21. RIGHTS—HOW CONSTRUED.—The rights of the public should be liberally, and those of the boom and pier owners strictly, construed. *Id.*

NAVIGATION—Continued.

- 22. BOOM-OWNER MAY USE CHANNEL REMAINING.**—The owner of a pier or boom does not thereby cease to have the right to use the channel which remains—he still retains that right in common with all others. *Id.*

NEGLIGENCE—See MASTER AND SERVANT.

NOTARY PUBLIC—See REAL ESTATE, 13-14.

NOTES—See BILLS, NOTES AND CHECKS.

ONUS PROBANDI—See EVIDENCE.

OPPOSITION TO DISCHARGE—See BANKRUPTCY, 25-26.

PARTNERSHIP.

INFORMAL DISSOLUTION OF PARTNERSHIP.—In Illinois, if the certificate of dissolution of a limited partnership does not fulfill the requirements of the statute the partnership still continues, and such informal dissolution does not affect the rights of a creditor. *In re Terry*, 110.

PATENTS.

- 1. PATENT FILTER WELL.**—A claim "in its application as a buried water reservoir in the bottom of a well, a filter, consisting of a perforated cylinder or cylinders, the central space forming a chamber into which the water is filtered, and from which the water supply is drawn," is not for a new subject matter, because the idea of burying any kind of filter is shown in Mr Bartlett's patent, and the same kind of filter shown in complainant's patent was previously shown in the Andries patent, and the idea of admitting no air to the interior of the filter, and thereby securing the atmospheric pressure to force the water through the soil into the filter, was shown in the drive wells of prior date. *Tillotson vs. Munson*, 426.
- 2. PATENTS—PRELIMINARY INJUNCTION.**—The ruling of a Federal Court in one circuit on a motion in a patent case, is not a sufficient decision upon the merits to warrant another court in issuing a preliminary injunction where the infringement is positively denied. *Sargent Manufacturing Co. vs. Woodruff*, 444.
- 3. PRESUMPTION FROM ISSUANCE OF LETTERS-PATENT.**—Where the defendant is manufacturing under letters-patent, the presumption is that he is not infringing, and unless the court can see, from an inspection alone of the patent, that it is an infringement, the court will not issue an injunction until after a full hearing. *Id.*
- 4. AVOIDING INJUNCTION.**—Where an injunction has been issued restraining a defendant from using patented parts of a machine, he is not at liberty to leave off certain parts selected by himself as infringements, and continue the use of the remainder of the machine; the proper course is for him to take the judgment of the court in the matter. *Hamilton vs. Simons*, 77.
- 5. ADVICE OF COUNSEL.**—Is not a sufficient justification, and council should not take such a responsibility. *Id.*

PATENTS—Continued.

6. **DAMAGES FOR INFRINGEMENT.**—The price for which the plaintiff has sold his rights to certain territory, is no criterion by which to determine the value of his patent, or the damages sustained from its infringement. *Campbell vs. Barclay*, 179.
7. Nor are such damages to be estimated solely by the profits which the defendant actually realized, for he may have conducted his business unskillfully. *Id.*
8. The true question is, what advantage might the defendant, by skill, have obtained by using the patented device instead of the old device? *Id.*
9. **CAWOOD PATENT CONSTRUED—PRACTICE ON REFERENCE, AS TO DAMAGES.**—Where a patent has been sustained by the court, the master, on a reference to ascertain and report the amount of damages caused by the infringement, should not go into the general question of infringement, nor consider the general scope and extent of the patent; he should simply examine and decide as to the extent of the infringement as to the particular machine used by the defendant. *Turrell vs. Illinois Central R. R. Co.*, 344.
10. **MASTER SHOULD SIMPLY APPLY THE PRINCIPLES LAID DOWN BY THE COURT.**—The principles as to the validity of the patent having been decided by the court, the master's duty is simply to apply them to the machines actually used. *Id.*
11. It is not his duty to go through the history of the machines offered in evidence, but only to compare them together. *Id.*
12. Where there has been a constant effort to approach as near as possible to the machine patented, such conduct of the defendants may be considered in deciding the question of infringement. *Id.*
13. **THE BAYN PATENT**, for a machine for mending rails, is not an infringement of the Cawood machine. *Id.*
14. **MEASURE OF DAMAGES—BASIS OF COMPUTATION.**—Where at the time of the use by the defendants of the Cawood machine there was no other method of repairing rails than a common anvil or swage-block, a comparison of these two methods is the proper basis for estimating the damages. *Id.*
15. It is not competent to show that it was unprofitable to repair rails by the Cawood machine, or that it would have been better to re-roll them, or otherwise dispose of them; it must be presumed that the defendants' interests were promoted by their use of the machine, and they cannot be permitted to show that they pursued the wrong policy. *Id.*
16. The proper basis for estimating the damages caused by the infringement is the cost of repairing the rails on the Cawood machine as compared with the cost by other known methods. The rule in *Mowry vs. Whitney*, 14 Wallace, 620, followed. *Id.*
17. *It seems*, that the difference in cost of the respective machines is a

PATENTS—Continued.

proper element in estimating the amount of profits arising from their use. *Id.*

18. **EXCEPTION—MUST SHOW WHEREIN ERROR CONSISTS.**—Where exceptions did not point out wherein the master erred, and the counsel do not direct the attention of the court to the evidence establishing the alleged error, such exceptions will be overruled. *Id.*
19. **CONSOLIDATED RAILROADS—DAMAGES APPORTIONED.**—Where railroad companies had consolidated and enlarged their charters, the master should ascertain to what extent each company had infringed. *Id.*

PAYMENT.

1. **PAYMENT TO ASSIGNEE—WHEN NO PROTECTION.**—Where a bill was filed by the payees against the assignee and maker of a note to set aside the transfer and recover the note, the summons being duly served on the maker, and payment by him of a judgment in favor of the assignees rendered in another court on a suit subsequently commenced, does not discharge his liability to the payees. *Pratt vs. Burr*, 50.
2. To protect himself, he should have given the payee notice of the second suit and required them to defend it, or have paid the money into court on the first suit. *Id.*

PLEADING.

1. **RELEASE—PLEADING.**—A release of a judgment which has been subsequently revived by *scire facias*, cannot be pleaded in an action brought on the revived judgment. *Snyder vs. Brichen*, 60.
2. **PLEADING FAILURE OF CONSIDERATION.**—In this defense to a note the plea should allege distinctly and with precision the actual consideration, and that there never was no other. *Gruninger vs. Philpot*, 82.
3. **PARTIAL FAILURE.**—The plea should be set up to what extent and wherein there has been a failure. *Id.*
4. **FRAUDULENT REPRESENTATIONS**—should be fully stated, with all necessary incidents of time and circumstance, and also that the party entered into the contract and gave the note relying upon such representations. *Id.*
5. **DISABLED DISTILLERY.**—In an action on a distiller's bond, under the Act of Congress of July 20, 1868, a plea that the still blew up, of which the assessor was duly notified, whereupon he locked up and took control of the property, is a good plea as to the time the still was thus disabled. *United States vs. Miller*, 128.
6. **PLEADING—DEMURRER.**—A plea that the written contract set forth in the declaration is not the contract made by the parties but is a fraud upon the defendant, is bad on demurrer; it is an attempt to change a written contract by oral testimony, and is also bad for uncertainty. *McDonald vs. Orvis*, 183.
7. Where the general issue has been pleaded, a demurrer to a special

PLEADING—Continued.

plea cannot be carried back to the declaration. Having tendered an issue of fact, the defendant cannot claim the benefit of a demurrer. *Id.*

8. **DEMURRER.**—Where the declaration is special, stating facts and circumstances, a plea setting up the same matter is bad; they can be given in evidence under the general issue. *Van Avery vs. Phanis Ins. Co.*, 193.
9. **EXCEPTION IN STATUTE—PLEADING.**—In an indictment under the act of July 13, 1863, for removing malt liquors without affixing and cancelling the proper stamps, it is not necessary to negative the cases where the law authorizes a removal without affixing a stamp. *United States vs. Schimer*, 195.
10. The presumption is that the liquor is only to be removed when sold or ready for sale, and if the removal was in a case allowed by law, that fact should be set up by way of defense. *Id.*
11. **EXCEPTION IN STATUTE.**—Where an exception in an act does not occur in the enacting clause it is not necessary to set it out or negative it in the indictment. It is matter to be set up by way of defense. *Id.*
12. **PARTICULARITY REQUIRED—SPECIFICATIONS.**—In an indictment for a statutory misdemeanor it is not necessary to charge the offense with the particularity of time, place, and circumstances required for a felony, or common-law offense and if the defendant desires greater particularity he should apply to the court for a rule for such specifications and particulars as will enable him properly to prepare for trial; the prosecution will be held strictly to their bill of particulars. *Id.*
13. **PLEADINGS IN CHANCERY.**—The Wisconsin code has not changed the pleadings in equity cases. *Burpee vs. First National Bank of Janesville*, 405.
14. **ANSWER—WHEN INSUFFICIENT.**—An answer by a defendant denying upon information and belief allegations in the bill concerning which his knowledge, if any, must be direct and personal, is insufficient, and if he had no knowledge it should be so stated directly. *Id.*
15. Such denials do not raise an issue, and the allegations must be taken as true. *Id.*
16. These rules apply to a corporation as well as to an individual. *Id.*

POSTAL LAWS.

1. **UNSTAMPED LETTER OF ADVICE.**—It is not a violation of the post-office laws for an express company to carry with a money letter or package, an unstamped letter of advice concerning said money. *United States vs. United States Express Co.*, 91.
2. It was the intention of Congress, in the Act of March 3, 1845, to permit an unstamped letter of advice relating merely to the article shipped to be transmitted with such article. *Id.*

PRACTICE—*See* ADMIRALTY, 85, 87. BANKRUPTCY, 20-24, 56-60, 66-67, 74. PATENTS, 2, 9-12.

PRACTICE—Continued.

1. **RETAINING JURISDICTION.**—Where a bill must be dismissed for want of equity, jurisdiction will not be retained to settle the priorities or equities between the defendants. *Smith vs. Little*, 490.
2. **REMEDIES—WHEN EXCLUSIVE.**—When the legislature creates a corporation, it can also prescribe what remedies shall be had against it, and such remedies then become exclusive. *In re Manufacturers' National Bank*, 499.
3. **COSTS.**—Where a petition to establish a right to payment in full has assumed the form of a regular suit, costs and a docket fee may be taxed against the petitioner. *In re Bank of Madison*, 515.
4. **COURT WILL RETAIN JURISDICTION TO PROTECT REAL PARTY IN INTEREST.**—Where by collision between the nominal parties to the record, a suit had been prosecuted to final judgment in the state court, pending proceedings in this court, this court will not allow the proceedings here to be dismissed against the wish of the real party in interest. *Nusbaum vs. Emery*, 393.
5. The fact that the defendant in the state court did not plead the pendency of the suit in this court is evidence of collusion between the parties. *Id.*
6. **MONEY HELD BY NOMINAL PARTY—WHEN ORDERED INTO COURT.**—Where money in controversy in a suit is held by a nominal party solely as trustee for another person not a party to the record, the court, at the instance of the party in interest, may order it to be paid into court. *Id.*
7. Where the holder of money, being an officer of the Government, had ceased to be such during the pendency of the suit, the court should order the money to be paid into court. *Id.*
8. **HOMESTEAD EXEMPTION** must exist and be claimed at the time the writ comes to the officer's hands. A defendant moving on to property thereafter cannot hold it exempt as a homestead. *Freeman vs. Stewart*, 19.
9. **PRACTICE.**—A creditor's bill having been filed, and a receiver appointed, the court will direct the assignment of such property to the receiver. *Id.*
10. **GARNISHMENT.**—In Wisconsin, an assignee under a fraudulent assignment may be made a garnishee in attachment proceedings, and it is immaterial how the property came into his hands, so it be property liable to seizure by attachment. *Perego vs. Bonesteel*, 69.
11. **PRACTICE—GARNISHEE.**—If the garnishee afterwards turns over property to a receiver appointed under a creditor's bill filed by another creditor, the court will protect him by ordering the proceeds of such property paid to the creditors to whom he was first liable as garnishee. *Id.*
12. **ASSIGNMENT OF INTEREST BY COMPLAINANT.**—Where a complainant has assigned his interest in the subject-matter of the

PRACTICE—Continued.

- litigation pending the suit, his assignee cannot on a supplemental bill be substituted to his rights. He must file an original bill in the nature of a supplemental bill. *Tappan vs. Smith*, 73.
13. ENTERING APPEAL NUNC PRO TUNC.—Where an appeal bond to the Supreme Court has been presented and approved, but no formal appeal prayed or allowed, though it was evidently the intention of the parties to appeal, and it was so understood by the court, it is competent for the court subsequently to enter an order *nunc pro tunc* allowing the appeal. *Nicholson vs. City of Chicago*, 89.
 14. SUPPRESSING DEPOSITION.—A deposition must be suppressed when it does not affirmatively appear that the witness resided more than one hundred miles from the place where the cause was to be tried. *Dunkle vs. Worcester*, 102.
 15. JURISDICTIONAL WORDS.—It is not competent for the court to supply a jurisdictional word, though the omission may appear to be merely clerical. *Id.*
 16. RECEIVING DEPOSITIONS TAKEN IN STATE COURT.—It is proper practice for the federal court, upon application before the trial, to allow depositions taken in a suit between the same parties for the same cause of action, to be filed as evidence. *Gruninger vs. Philpot*, 104.
 17. PARTY OBJECTING.—A party objecting should show affirmatively that there was mistake, misapprehension, or other good cause why they should not be received. *Id.*
 18. In doubtful cases, it is better, ordinarily, to admit than to exclude evidence. *Id.*
 19. APPLICATION FOR INJUNCTION.—On filing a bill for an injunction, it is not competent for the complainant to fix a time for hearing the motion for an injunction so far ahead as to embarrass the defendant. The court will, on application, anticipate the rule day. *Waleworth vs. Board of Supervisors*, 133.
 20. JUDGMENT IN VACATION cannot be entered unless in pursuance of a positive statute, whose provisions must be fully complied with. *Bonnell vs. Weaver*, 22.
 21. COGNOVIT.—In Wisconsin, the authority to confess the judgment must be in the statutory form, and be produced before the officer entering the judgment. *Id.*
 22. Equivalent provisions cannot be substituted by the court, for the positive statutory provisions. *Id.*
 23. VACATING JUDGMENT—COURT MAY ENTER NEW JUDGMENT.—It is competent for the defendant to move to vacate the judgment, and also for the court thereupon, the proper papers being before it, to render a new judgment and issue execution.
 24. BILL OF REVIEW.—Where on bill of foreclosure by the holder of two notes secured by mortgage, neither the bill nor decree accounted nor provided for the third note, a bill of review will lie by the defend-

PRACTICE—Continued.

- ants, even though the decree has not been executed. *Phillips vs. Mariner*, 26.
25. **COLORABLE CONVEYANCE TO CONFER JURISDICTION—PRACTICE.**—The defendant, after judgment in ejectment and new trial allowed, cannot maintain a bill for discovery whether the conveyance to plaintiff was not merely colorable, and made in order to give this court jurisdiction. *Richardson vs. Mattison*, 31.
26. *It seems* that the proper practice is to move for leave to file a plea in abatement, supported by affidavit showing that the plaintiff, at the time he went to trial on the merits, did not know the facts concerning the alleged colorable conveyance. *Id.*
27. **WRIT OF ASSISTANCE** will be granted when the defendants refuse to surrender under the decree. *Pratt vs. Burr*, 36.
28. **ABATEMENT.**—Certificate of counsel that, in his opinion, the plea is well founded, need not accompany a plea of abatement in the federal court. *Nelson vs. Foster*, 44.
29. **STATE COURTS.**—The federal court will take cognizance of the constitution and laws of the state on the subject of her courts, and ascertain which are courts of general jurisdiction. *Id.*
30. **FORMER ACTION PENDING.**—A plea of another action pending, in the usual form that the former suit was at the time of the commencement of this suit, and still is pending, is sufficient without alleging that the former suit was not discontinued before the plea was filed. *Id.*
31. **SUIT IN STATE COURT.**—The pendency of a suit in a state court is a good plea in abatement in the federal court. *Id.*
32. **MONEY IN MARSHAL'S HANDS.**—Where the marshal has money in his hands, the balance of proceeds of sale of property claimed by a party other than the execution debtor, and to recover which such party has brought suit against him, the court will not order him to pay the money into court pending such suit, there being no proof of collusion or danger of loss. *Day vs. Emerson*, 56.
33. **SERVING PARTY TO SUIT.**—A non-resident defendant, coming within a state for the purpose of defending his suit, cannot be legally served with process in another suit, even though the prior suit be first discontinued. *Juneau Bank vs. McSpedan*, 64.
34. **STRIKING OUT SERVICE.**—The court will order the service so made to be stricken out. *Id.*
35. **CREDITOR'S BILL.—CONFLICTING CLAIMS.**—After the appointment of a receiver under a creditor's bill another creditor can acquire no rights by levying an attachment upon property of the judgment debtor. Where the court has obtained jurisdiction under a creditor's bill it will protect the creditor in following up his rights. *Perego vs. Bonesteel*, 66.
36. **ANSWER UNDER OATH PREVAILS OVER DATE OF INSTRUMENT.**—

PRACTICE—Continued.

Where, in a bill to set aside a conveyance on the ground of fraud by the defendants, the complainant calls for the answers of the defendants under oath as to the actual date of the execution of a contract relied upon, and the defendants answer under oath that it was not executed until a day much later than its date, the *prima facie* evidence made by the instrument itself is overcome. *Wulker vs. Derby*, 184.

37. In such case the rule applies that the answer called for under oath is, if responsive to the bill, conclusive, unless disproved by two witnesses, or by one witness and strong corroborative evidence. *Id.*
38. ALLEGATIONS IN BILL NEVER FILED, NOT EVIDENCE.—Allegations in a bill against a purchaser of real estate prepared by counsel for the agents but never signed nor filed, are not important as evidence against them on behalf of the vendor. *Id.*
39. Testimony of witnesses in regard to the value of property at an anterior date commented upon. *Id.*
40. TEST OF ADEQUACY OF CONSIDERATION—MARKET VALUE AT THE TIME.—On the question of adequacy of consideration; its value at a subsequent date cannot be considered. The question is as to its actual market value at the time of the transaction. *Id.*
41. WITNESS FEES cannot be taxed in the federal courts unless the witness has been regularly subpoenaed. *Sawyer vs. Aultman and Taylor Manf. Co.*, 165.
42. It is not sufficient that they attend at the request of the party. The act of Congress evidently contemplated some process of the court. *Id.*
43. CHARGING JURY—STATE LAW AND PRACTICE are not binding on the federal courts. *Hankin vs. Squires*, 186.
44. Previous to the entering of final decree, any interlocutory decree is subject to examination and modification. *Pullan vs. C. & C. Air-Line R. R. Co.*, 237.
45. SERVICE OF PROCESS MUST CONFORM TO STATE RULE.—Since the act of Congress of June 1st, 1872, the process of the federal courts must be served in the manner prescribed by the state law, and this court has no power to prescribe or substitute any other mode. *Perkins vs. City of Watertown*, 820.
46. Though by the original charter of the city, under which the bonds in suit were issued, service might be made on the mayor or clerk, the legislature has the power to alter the charter in that respect. It is no part of the contract. *Id.*
47. SERVICE UPON THE MAYOR-ELECT—Before acceptance or qualification is not a service upon the mayor of the city. The fact that there was no mayor or acting mayor upon whom service could be made, does not augment the power of the court. *Id.*
48. EXCEPTION—MUST SHOW WHEREIN ERROR CONSISTS.—Where excep-

PRACTICE—Continued.

tions did not point out wherein the master erred, and the counsel do not direct the attention of the court to the evidence establishing the alleged error, such exceptions will be overruled. *Turrill vs. Illinois Central R. R. Co.*, 844.

PRACTICE IN BANKRUPTCY—See BANKRUPTCY,

PREMIUM—See INSURANCE, 25, 26.

PRINCIPAL AND AGENT—See INSURANCE, 25, 26.

1. **AGENCY—WHEN TERMINATES.**—The agency of a real estate agent and his duty to his principal ceases upon the delivery of the title papers and payment for the property. *Walker vs. Derby*, 184.
2. **AGENT MAY AFTERWARDS DEAL IN THE PROPERTY.**—After the termination of the agency the agents have the same right as any other persons to deal in the property. *Id.*
3. The vendor, in order to set aside the sale, must show that such interest was acquired during the continuance of the agency. *Id.*
4. **NO DUTY AS TO THE DISCLOSURE.**—If they afterwards acquire an interest from the purchaser, they are under no obligations to disclose that fact to the vendor, and the fact that they do not disclose it to him is not a circumstance tending to show fraud or bad faith. *Id.*
5. **LEAVING PURCHASE MONEY SECURITIES WITH AGENT DOES NOT CONTINUE THE AGENCY.**—The fact that the notes and mortgage securing the unpaid portion of the purchase money were by agreement left with the agents in escrow, to await the delivery of a quit-claim deed from other parties which the vendor had agreed to furnish, does not change the relation of the parties nor operate to continue the agency. *Id.*
6. **INADEQUACY OF CONSIDERATION—MUST BE GROSS.**—To set aside the conveyance for inadequacy of consideration the price must be so small as to strike the mind at first blush as grossly inadequate, and raise the conviction that the property was sacrificed. *Id.*
7. It is not sufficient to show that certain parties might, under certain contingencies, give more on time, when one object of the vendor was to sell for cash. *Id.*
8. The responsibility of the purchaser and the negotiability in the market of the securities executed by him, may also be considered. *Id.*
9. **PRESENCE OF PRINCIPAL—EFFECT.**—Where the principal was present and assisting in the negotiations the rigid rule in regard to the relations between principal and agent do not apply with full force. *Id.*
10. This fact is especially important as to the question of adequacy of consideration. *Id.*
11. **ALLEGATIONS IN BILL NEVER FILED, NOT EVIDENCE.**—Allegations in a bill against the purchaser prepared by counsel for such agents, but never signed nor filed, are not important as evidence against them on behalf of the vendor. *Id.*

PRINCIPAL AND AGENT—Continued.

12. Testimony of witnesses in regard to the value of property at an anterior date commented upon. *Id.*
13. TEST OF ADEQUACY OF CONSIDERATION—MARKET VALUE AT THE TIME.—On the question of adequacy of consideration, its value at a subsequent date cannot be considered. The question is as to its actual market value at the time of the transaction. *Id.*
14. FIDUCIARY DEBT—COLLECTION BY AGENT.—Money collected by an agent under an agreement to account and pay over the proceeds monthly to his principal, is not a debt created in a "fiduciary character" within the meaning of the bankrupt act. *Grover & Baker S. M. Co. vs. Clinton*, 321.
15. A bankrupt is not liable to arrest on such a debt, and it is discharged in bankruptcy. *Id.*
16. MINGLING FUNDS—CONVERSION.—*It seems*, that when an agent is to account monthly with his principal, a court might infer that the agent was allowed to mingle the money collected with his other funds, and to consider himself an absolute debtor for the amount, and if authority so to do may be implied from the course of dealing, the agent would be exempted from special liability for a conversion of the money. *Id.*

PROMISSORY NOTES—See BILLS, NOTES AND CHECKS.**PROTEST—See BILLS, NOTES AND CHECKS, 1.****PURCHASER—See REAL ESTATE, 9. VENDOR AND VENDEE.****RAILROADS.**

1. EARNINGS OF RAILROAD COMPANY—BASIS OF COMPUTATION.—Where under a decree of foreclosure against a railroad company, reference had been made to a master to ascertain the gross earnings and expenses of a certain section of the road covered by a mortgage, it is not an erroneous principle for the master to make a *pro rata* estimate of the earnings and expenses of the whole road, it being shown before him that such section had not been operated separately, but as a part of the whole road, and no separate accounts kept of the income or expenses of any particular part. Though such a rule leads not to actual results, but to approximation merely, it is the best which could be adopted. *Pullan vs. O. & O. Air-Line R. R. Co.*, 237.
2. WHEN COMPANY ESTOPPED BY NEGLECT.—The railroad company cannot complain of the adoption of this rule where it is under a legal obligation to keep separate accounts of such section, and where it was by its own neglect that such separate accounts were not kept. *Id.*
3. MORTGAGE MAY COVER FUTURE EARNINGS—EQUITABLE LIEN.—Notwithstanding the general rule that the mortgagor, until some action by the mortgagee, is entitled to the earnings and profits of the mortgaged property, it is competent for the parties to agree in the mortgage that such future earnings and profits shall be held in

RAILROADS—Continued.

equity by the mortgagee, and under such a contract such income whenever received is operated upon by the mortgage, and the party receiving it holds it in trust for whoever is in equity entitled to it. *Id.*

4. **WHEN MORTGAGOR CHARGEABLE AFTER ORDER TO SURRENDER.**—Such a mortgagor remains chargeable with the income, even after he has offered in open court to surrender the property to the mortgagee. The mortgage only took effect upon the income when earned, and as long as the mortgagor operated the road and earned income, he could not avoid his responsibility for it. The only valid answer would be either that he did not operate the road, or that there was no income earned. *Id.*

5. **MASTER'S ESTIMATE—CONDUCT OF OBJECTOR.**—Though an estimate by the master may not be entirely satisfactory to the court, if there is evidence which seems to justify him in his conclusions and the party objecting did not furnish the master with evidence of any other state of facts, nor give him the proper assistance, the court will not usually interfere with the master's report on that ground. *Id.*

6. **WHERE HIGHEST ESTIMATE ADOPTED—BURDEN ON OBJECTOR.**—Where under conflicting evidence the master had placed the highest estimated value upon property, the court will not set aside the master's report in this respect, unless there are circumstances in the case which show that the evidence fixing the lower value was more entitled to credit, and it is the duty of the party making the exception to satisfy the court that the report is wrong in this respect. *Id.*

7. **RENT OF ROLLING STOCK.**—Eight per cent. is too low a rent for the use of rolling-stock where the owner bore all the loss and deterioration. *Id.*

8. **MORTGAGOR OF PART—WHERE WHOLE INTEREST MAY BE BOUND.**—*It seems,* that although the mortgage only covered this one section, when a subsequent mortgagee in possession operated the whole road as an entirety, and had kept no separate account of that section, but mingled the earnings of the whole road, his whole interest in the road would be equitably bound for the amount of income. *Id.*

REAL ESTATE—See JURISDICTION.

1. **DEFECTIVE DESCRIPTION.**—Where a decree of foreclosure does not in terms describe the land, but simply refers to it, and the defendant in ejectment derives title under the decree, it is for the jury to decide whether the land in controversy was that covered by the decree. *Kidde vs. Thompson*, 226.
2. **Indicia stated by which a decree may be identified as referring to a certain mortgage.** *Id.*
3. **DECREE OF FORECLOSURE.**—It is a judicial finding of default in payment, and the mortgagee has thenceforth the right of entry for condition broken. *Id.*

REAL ESTATE—Continued.

4. The equity of redemption of infant heirs under this decree was barred in one year after they became of age. *Id.*
5. **ENTRY ON CONDITION BROKEN.**—The grantees of the heirs of the mortgagee have the same right as the mortgagee to enter the mortgaged premises for condition broken. *Id.*
6. **LAPSE OF TIME** does not raise the presumption of payment if proceedings have been taken to foreclose the mortgage, or if the mortgagor and his heirs have never resided within the state. *Id.*
7. **SQUATTERS—EJECTMENT.**—The owner of the fee can maintain ejectment against a squatter who has neither claim nor color of title. *Sykes vs. Hayes*, 529.
8. Where the squatter had admitted title in the plaintiff's grantor, it is not necessary that the plaintiff introduce other evidence of title than the conveyance from his grantor. *Id.*
9. **DEFECT IN TITLE—RELIEF TO PURCHASER.**—A purchaser in undisturbed possession will not be relieved from payment of the purchase money on the ground of defect of title, there being no fraud or misrepresentation. He must rely upon his covenants. *Campbell vs. M. d. bury*, 83.
10. **DEDICATION—WHAT CONSTITUTES.**—Where, in a town plat, one block appears unsubdivided, and without number or marks, that does not constitute a dedication to public purposes; but a statement by the owners at the time, that it was to be a public square, is a dedication for that purpose. *Ruch vs. City of Rock Island*, 95.
11. **IRREVOCABLE.**—A dedication once made cannot be recalled; and the intention of the owners at the time is to be considered—not their intention at any subsequent time. *Id.*
12. **ESTOPPEL.**—A purchase by the city of the rights of parties occupying ground claimed as dedicated, does not compromise its claim under the dedication. *Id.*
13. **ACKNOWLEDGMENT—NOTARY'S SEAL.**—Nothing will be presumed in favor of a notary's certificate of acknowledgment. He must state all the facts necessary to show a valid official act, and that he has affixed his notarial or official seal. *Westmore vs. Laird*, 160.
14. A certificate which fails to show that the seal affixed is his notarial or official seal is insufficient. *Id.*
15. **ILLEGITIMATE CHILDREN—RULE OF DESCENT.**—The term "children," as used in the Illinois Statute of Wills, concerning illegitimates, is used in the sense of offspring of the mother, and is not confined to children born in lawful wedlock. *Rogers vs. Weller*, 166.
16. In case of the death of one or two illegitimate children, unmarried and without issue, the mother being also dead, his property descends to the brother. He takes one-half of the estate as brother of the deceased; the other half as heir-at-law of the mother. *Id.*
17. "Next of kin to the mother" in this statute, includes illegitimate as well as legitimate children. *Id.*

REAL ESTATE—Continued.

18. **TITLE UNDER STATUTES OF LIMITATION.**—Where a party claims land under the Illinois limitation laws, he must deduce a title directly from a specified source, and by a chain, each link of which is a genuine conveyance. *Hedges vs. Lessees of Paulin*, 177.
19. **RENTS AND PROFITS OF WIFE'S REALTY.**—In Illinois, since the Act of 1861, where real estate is conveyed by the husband to a third party and by him to the wife without consideration, the rents and profits still belong to the husband. *In re Brandt*, 217.
20. Property so conveyed is not acquired by her from a "person other than her husband," within the meaning of the Act of 1861. *Id.*
21. **CONVEYANCE SHOULD EXPRESS SEPARATE USE.**—In order to fully protect the wife's rights in property conveyed to her, the deed must indicate the intent to convey to her for her sole and separate use. *Id.*
22. **EQUITY WILL ALLOW SUPPORT TO WIFE.**—A court of equity will, however, recognize the wife's equitable rights, and if these rents and profits are her only means of support, will allow her therefrom a reasonable support in preference to the husband's creditors. *Id.*

RECITAL—*See* MUNICIPAL BONDS.

RELEASE—*See* PLEADING, 1.

REVENUE LAWS—*See* INTERNAL REVENUE.

SEAL—*See* REAL ESTATE, 13-14.

SET-OFF—*See* BANKRUPTCY, 38, 47-53.

SLANDER—*See* LIBEL.

STOCK AND STOCKHOLDER—*See* BANKRUPTCY, 43, 47-50—INSURANCE—CORPORATION.

STOCK NOTES—*See* INSURANCE, 8.

SUNDAY—*See* BILLS, NOTES AND CHECKS, 1.

TROVER—*See* BANKRUPTCY, 76.

TUG—*See* ADMIRALTY, 15-20.

USURY.

1. A creditor offering to prove a debt against a bankrupt estate stands in the position of a plaintiff at law, and in Illinois if his debt is usurious, forfeits the whole interest. *In re Martin Prescott*, 523.
2. The assignee can take advantage of usury, and the defense is good so long as any part of the principal debt remains unpaid. *Id.*

VENDOR AND VENDEE—*See* BANKRUPTCY, 54-55.

1. **FRAUDULENT PURCHASE AND SALE—ASSUMPSIT.**—Where a merchant has, by means of false representations, purchased goods for his store on credit, and then sells his stock in fraud of his creditors, and the goods sold cannot be found, the vendor may bring assumpsit before the credit has expired. *Barrett vs. Koella*, 40.
2. **PRESUMPTIONS.**—Where such goods cannot be found, the presumption is that they have been sold and for cash. If it is shown that he took notes for part, the presumption is that the notes were negotiable. *Id.*

WASTE.

1. **RESTRAINING WASTE.**—In Wisconsin, under the revised statutes of 1849, the holder of a certificate of a sale of land on execution cannot maintain a bill to restrain waste. He has neither title nor right of possession until his deed is issued. *Law vs. Wilgees*, 13.
2. The laws for the sale of lands upon execution contain the whole system, and the court cannot supply any supposed deficiencies. *Id.*

WAIVER.

1. **WAIVER OF MARITIME LIEN.**—A mariner's lien will not be considered as waived by anything less than an express contract. Attaching the vessel under a state law, and settling that proceeding on receiving notes secured by a mortgage on the vessel, which afterwards became worthless, does not constitute a waiver of the maritime lien. A libel may still be sustained, and the decisions as to waiver of liens under state statutes are not applicable. *The Gate City*, 200.

WITNESSES—*See* CRIMINAL LAW, 3—PRACTICE, 41-42.

WRIT OF ASSISTANCE—*See* HOMESTEAD, 3.

